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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

RON PAUL,
Petitioner,

v.

ROBERT ALTON GAMMAGE,
Respondent.

76-1408

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

FITZHUGH PANNILL
CARY V. SORENSEN
AUSTIN & ARNETT
1938 Bank of the Southwest Building
Houston, Texas 77002
(713) 652-5007
WILLIAM H. ALLEN
JOHN R. BOLTON
COVINGTON & BURLING
888 Sixteenth St., N. W.
Washington, D. C. 20006
(202) 452-6000
Attorneys for Petitioner Ron Paul

Of Counsel:
F. HASTINGS PANNILL
4600 Post Oak Place, Suite 207
Houston, Texas 77027
BERTRAND C. MOSER
400 Houston Bar Center Building
Houston, Texas 77002

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Petitioner Ron Paul prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas in this case.

OPINION BELOW

The opinion of the Supreme Court of Texas is not yet reported. It is attached to this petition as Appendix A (pp. 2a-11a, *infra*).

JURISDICTION

The final judgment of the Supreme Court of Texas (App. A, p. 9a, *infra*) was entered March 2, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Is the application of a state election contest statute to congressional elections repugnant to Article I, Section 5, of the United States Constitution, which provides that each house of Congress is the judge of the elections, returns, and qualifications of its own members?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 2, of the United States Constitution provides, in part, as follows:

> The House of Representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.
>
> • • •
>
> When vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies.

Article I, Section 4, of the United States Constitution provides, in part, as follows:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

Article I, Section 5, of the United States Constitution provides, in part, as follows:

> Each House shall be the judge of the elections, returns, and qualifications of its own members . . . .

Article 9.01 of the Texas Election Code provides, in part, as follows:

> The district court shall have original and exclusive jurisdiction of all contests of elections, general or special, for all school, municipal, precinct, county, district, state offices, or *federal offices*, except elections for the offices of Governor, Lieutenant Governor, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, Attorney General, and Members of the Legislature. (emphasis added).

STATEMENT OF THE CASE

Petitioner Ron Paul was the Republican candidate, and respondent Robert Gammage was the Democratic candidate, for United States Representative from the 22d District of Texas in the general election held on November 2, 1976. A numerical recount of the votes indicated that Gammage had prevailed by a margin of 268 of the 192,802 votes cast. Gammage appeared to have received 50.07 percent of the votes to Paul's 49.93 percent. Gammage's majority was the smallest of any 1976 congressional election. After a recount, Paul instituted an election contest in the 151st Judicial District Court of Harris County, Texas, pursuant to jurisdiction conferred upon that court by Article 9.01 of the Texas Election Code. That article expressly includes federal offices.[1] Paul alleged that there were sufficient illegal votes and vote-counting irregularities to change the outcome of the election or, alternatively, to make the outcome of the election undeterminable.

Paul then filed a notice in the United States House of Representatives in which he advised of the pendency of the Texas contest and requested that proceedings in the House

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[1] The term "federal offices" is elsewhere defined in TEX. ELEC. CODE ANN. art. 6.05c to include United States Representative. (App. C, pp. 33a, *infra*).

be stayed pending completion of the state election contest. Gammage was sworn in without objection on January 3, 1977, and the matter was referred to committee.

On December 30, 1976, Gammage filed a motion in the trial court to dismiss for lack of jurisdiction. He asserted that the state contest statute was unconstitutional because Article I, Section 5, of the United States Constitution makes each house the judge of the elections, qualifications, and returns of its own members. The motion was denied on January 17, 1977.

Gammage then asked the Supreme Court of Texas for leave to file a petition for a writ of mandamus directing the District Court to dismiss the case. On January 25, 1977, the Texas Supreme Court denied leave. On February 9, 1977, Gammage again requested leave to file a petition for writs of mandamus and prohibition directing Paul not to use court-ordered discovery in the state election contest. On both occasions, Gammage contended that Article 9.01 violates the United States Constitution. On March 2, 1977, by a vote of 5 to 4, the Texas Supreme Court held that "as to members of Congress, Article 9.01 is unconstitutional and inapplicable" because contrary to Article I, Section 5, of the United States Constitution (App. A, p. 6a, *infra*). The court ruled, in short, that the House of Representatives is the exclusive arbiter of Paul's allegations, ordered the District Court to dismiss the election contest, and prohibited Paul from taking further action in state court.[2] (App. A, p. 9a, *infra*).

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[2] The writ of mandamus was issued to the Honorable John L. Compton, Judge of the 151st District Court. Pursuant to Rule 21(4), petitioner has notified the Clerk of this Court in writing that Judge Compton has no interest in the outcome of this petition.

REASONS FOR GRANTING THE WRIT

In *Roudebush* v. *Hartke*, 405 U.S. 15 (1972), this Court rejected a contention that a state's statutory provision for recounting congressional election ballots could not stand in the face of Article I, Section 5, of the Constitution. *Roudebush* involved an Indiana election recount; this case involves a Texas election contest. That distinction is insignificant: the Indiana recount commission was charged with the duty of going beyond a mere mechanical re-tally and with making judgments as to which votes were properly counted. The very same judgments are made by a Texas court hearing an election contest. Neither procedure interferes with the powers of the House under Article I, Section 5. The decision below is thus in conflict with this Court's decision in *Roudebush*. Whether or not in conflict with *Roudebush*, the lower court has decided an important constitutional question contrary to the holdings of the highest court of another state and of a three-judge federal court. Moreover, the court below has cast doubt upon the validity of the election statutes of several other states. The decision below denies proper scope to the broad powers reserved to the states by Article I, Sections 2 and 4, to establish the qualifications of congressional electors and to prescribe the manner of congressional elections.

I.

The petition should be granted because the decision below conflicts with a prior decision of this Court.

The Texas Supreme Court held that Article I, Section 5, means that the two houses of Congress have exclusive jurisdiction to consider contested elections involving their members. For that reason, the Court ruled that Article

9.01 of the Texas Election Code,[3] specifically empowering Texas courts to hear election contests regarding federal offices, is unconstitutional in its application to congressional elections. (App. A, p. 9a, *infra*).

This Court's decision in *Roudebush* v. *Hartke, supra,* is to the contrary. In that case, the initial returns indicated that Hartke had received a majority of the votes. He moved to enjoin the recount instituted by the contesting candidate Roudebush, and asserted that Indiana's statutory provisions for recounting election ballots violated Article I, Section 5, when applied to a senatorial election. On appeal from a three-judge district court's injunction of the recount, this Court reversed. It held that as an integral part of the Indiana electoral process, a recount was "within the ambit of the broad powers delegated to the states by Article I, Section 4." 405 U.S. at 25. Such state action was permissible unless it actually interfered with the exercise of the powers granted to each House by Article I, Section 5:

> It is true that a State's verification of the accuracy of election results pursuant to its Art. I, § 4, powers is not totally separable from the Senate's power to judge elections and returns. *But a recount can be said to 'usurp' the Senate's function only if it frustrates the Senate's ability to make an independent final judgment.* A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conducted its own recount. (emphasis added).

405 U.S. at 25.

In the instant case, the majority of the Texas Supreme Court attempted to distinguish *Roudebush* because that

[3] Attached as Appendix C (pp. 33a-52a, *infra*) are article 9.01 and certain other pertinent provisions of the Texas Election Code.

case involved a recount and this one involves a contest. Neither the reasoning nor the holding of this Court in *Roudebush,* however, gives constitutional significance to such a distinction. The Indiana recount had as its object a determination of who received the most votes. The judicially-appointed recount commission performed functions that went beyond mere arithmetical calculations and made judgments as to the meaning and validity of particular ballots. 405 U.S. at 23. This Court recognized that although a recount is within the power of the Senate under Article I, Section 5, it is also a proper activity of the state within Article I, Section 4. 405 U.S. at 25-26. In either instance, the object is to determine the winner, or to judge the election.

The plain meaning of *Roudebush* is that a state is not prohibited from performing essentially the same function under Article I, Section 4, as the Senate may independently perform under Article I, Section 5. The state has a vital interest in verifying the accuracy of its election returns. Its broad powers to achieve this end stop only at the point of actual interference with the ability of Congress to make the final decision.

The procedures required in a Texas election contest do not transgress the limits on valid state action established by this Court in *Roudebush* v. *Hartke.* The object of an election contest, of the Indiana recount, and of every other count, recount, or verification under Article I, Section 4, is to determine which candidate received the majority of legally cast ballots or, in other words, who won the election. As this Court observed concerning the Indiana provision involved in *Roudebush,* this task cannot be wholly separated from the power of the House to judge elections and returns. 405 U.S. at 25. But for Texas to judge these results does not prevent the Congress from also judging them. There can be no interference with the powers of

the House unless the procedures established by Texas threaten to make it impossible — or at least more difficult — for Congress to exercise its ultimate authority and to make an independent final determination. *Id.*

There is nothing in the Texas procedures which would interfere with such a determination by the House. In Texas, a review of the ballots counted is made by the judge of a district court rather than by a commission. TEX. ELEC. CODE ANN. arts. 9.08, 9.14 (App. C, p. 40a, *infra*). He can look behind the ballots to determine whether they were actually cast, and to determine whether persons casting them were entitled to do so. TEX. ELEC. CODE ANN. art. 9.14.

None of these activities constitute interference with the powers of the House within the meaning of this Court's holding in *Roudebush* unless there is some likelihood that they will result in the destruction or alteration of the voting records needed for a final determination. In the case at bar, no such likelihood was claimed by the respondent or found by the court below.

Nor does the application of the Texas statute in this case "usurp" House authority. Regardless of how or when the state announces the results of its judicial review of the election, the House is free at that time to accept or reject the findings of the Texas courts.[4] The decision of the House

[4] The Texas court notes that Gammage was seated "unconditionally," whereas in *Roudebush* the resolution seating Hartke had been made "without prejudice" to an appeal pending in this Court. Actually the dispute here was referred to committee after the swearing-in ceremony. In any event, "seating" or "swearing in" does not operate as a final resolution of the controversy, since a seated member can be removed. This occurred, for example, in *Roy* v. *Jenks*, 81 CONG. REC. 3 (1937) (unconditional seating of contestee Jenks); 83 CONG. REC. 8662 (1938) (seating of successful contestant Roy one and one-half years later). Concerning the instant controversy, *see* 123 CONG. REC. H-156—57 (daily ed. Jan. 6, 1977) (remarks of Rep. Wiggins).

is not the issue here.[5] The issue is solely whether Texas may establish a contest procedure to review a congressional election. *See Roudebush* v. *Hartke,* 405 U.S. at 19. As one of the dissenting justices on the Texas Supreme Court aptly pointed out:

> While the objective of an election may be to select the most popular candidate, its vital function is to legitimize governmental authority. . . . Those persons who participated in the election are entitled to an orderly declaration of the final results of that political event, without regard to the question of which candidate shall be seated by Congress.

App. A, p. 19a, *infra*. Post-election review of the returns, whether recount or contest, is an integral part of the process designed to perform this "vital function."

Thus, the decision of the court below does not resolve a conflict between the powers of the House and the powers of the state. Rather, it places an unnecessary and unconstitutional limitation upon a function reserved to the states by the United States Constitution. That function is complementary to the final power of the House. Although in the matter of elections the House exercises powers of a judicial nature, it is primarily a legislative body. It does, and must, rely upon the integrity and accuracy of the state election processes.[6]

Any state procedure which helps to insure the integrity of a state-held election for federal office benefits the state

[5] Even if the House were to decide the contest on the merits, it obviously has plenary constitutional power to reverse its decision. Thus the Texas litigation could proceed to a conclusion, and, if the Texas court review reveals new grounds, the House could choose whether to reconsider its earlier decision. That fact alone demonstrates why House action does not render a state contest moot.

[6] Official state action is presumed by the House to be regular and correct. *Tunno* v. *Veazey,* H.R. REP. No. 92-626, 92d Cong., 1st Sess. (1971) at 10.

and the Congress alike. The decision below, on the other hand, deprives the people and the Congress of an adequate state review of the fairness of an election for federal office. In doing so, it also conflicts with the holdings of this Court in *Roudebush* v. *Hartke* and should be reviewed and reversed.

II.

The decision below, whether or not in conflict with Roudebush *v.* Hartke, *raises a substantial federal question which should be reviewed by this Court.*

If the distinction between contests and recounts is real, rather than merely nominal, then the decision below raises an important constitutional question which has not been, but should be, decided by this Court. A number of states have contest statutes which do or may apply to congressional elections.[7] Since *Roudebush*, two courts, one state

[7] The contested election statutes of six states expressly apply to general elections for congressional seats:
Connecticut, CONN. GEN. STAT. ANN. § 69-323 (West, 1977 rev.);
Georgia, GA. CODE ANN. § 34-1702 (1970);
Iowa, IOWA CODE ANN. Ch.57.1 (as amended Acts 66th Gen. Assembly, House File 1011 § 50 (1976));
Minnesota, MINN. STAT. ANN. § 209.02 (1976);
Pennsylvania, PA. STAT. ANN. § 25-3291 (1963);
South Carolina, S.C. CODE § 23-467.1 (Supp. 1976).
Twelve other states have contest statutes which apparently encompass congressional elections:
Arkansas, ARK. STAT. ANN. § 3-1001 (1976);
California, CAL. ELEC. CODE §§ 20,000 *et seq.* (West) (1961);
Hawaii, HAW. REV. STAT. § 11-85.2 (1965);
Idaho, IDAHO CODE §§ 34-2001 *et seq.* (1963);
Maryland, MD. ELEC. CODE §§ 19-1 *et seq.* (1976);
New Jersey, N.J. STAT. ANN. § 19:29-1 (1964);
New Mexico, N.M. STAT. ANN. § 3-14-1 (1970);
New York, N.Y. ELEC. LAW §§ 1-102, 16-100(1) *et seq.* (McKinney) (1976, effective December 1, 1977);
North Carolina, N.C. GEN. STAT. § 163-181 (1976);
Oregon, OR. REV. STAT. § 251.025 (1975);
Utah, UTAH CODE ANN. §§ 20-15-1 *et seq.* (1976);
Wyoming, WYO. STAT. ANN. §§ 22.1-242 *et seq.* (Supp. 1975).

and one federal, have confronted the issue presented in this case. Both have held that state election contests are not in conflict with Article I, Section 5 of the United States Constitution.

In *Lacaze* v. *Johnson*, 302 So. 2d 613 (La. 1974), the state trial court had enjoined the certification by state authorities of one candidate as the winner of a general election for a seat in the United States House of Representatives. The Supreme Court of Louisiana upheld the injunction pending the trial court's resolution of a contest between the two candidates. It explicitly relied on this Court's decision in *Roudebush* as authorizing state election contests. Similarly, in *Durkin* v. *Snow*, 403 F. Supp 18 (D.N.H. 1974), a three-judge district court was asked to enjoin proceedings before the New Hampshire Ballot Law Commission and an election contest instituted in state court. It refused to enjoin either proceeding and held that this Court's decision in *Roudebush* permitted state court election contests. *Id.* at 20.

The Texas Supreme Court has thus decided a federal constitutional question of very substantial importance inconsistently with the holdings of two other courts.[8] Therefore, even if this case were not controlled by *Roudebush*, the conflict of the holding below with *Lacaze* and *Durkin*, and its impact on the election contest statutes of several states warrants consideration by this Court of whether a state may conduct an election contest of a federal congressional election consistently with the provisions of Article I, Section 5.[9]

[8] The published articles in the field also interpret *Roudebush* as permitting contests. *See Developments in the Law — Elections*, 88 HARV. L. REV. 1111, 1302 (1975); Shortess and Douglas, *State Courts and Federal Elections*, 62 A.B.A.J. 451 (1976) (a joint article by the trial judges in *Durkin* and *Lacaze*).

[9] Apparently the House also views state contests as permissible. It has not interfered with state election contests since passage

III.

The decision below improperly constricts the ability of the states to protect voting rights in federal elections.

The right to vote is the fundamental right from which all other rights derive and without which they are illusory. *Wesberry* v. *Sanders,* 376 U.S. 1, 17 (1964); *Yick Wo* v. *Hopkins,* 118 U.S. 356, 370 (1886). It is impossible to distinguish between the right to cast a ballot and the right to have it properly counted. *Gray* v. *Sanders,* 372 U.S. 368, 380 (1963). The right to have a vote counted, and counted accurately, is a right protected by the United States Constitution. *United States* v. *Classic,* 313 U.S. 299 (1941).[10] For the democratic process to be meaningful, each elector's vote must be given equal weight. *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964). This object cannot be attained if the effect of his ballot is diluted by counting fictitious ballots which were not cast, or were "cast" by persons who do not exist.[11] The integrity of the election

of the Federal Contested Elections Act. *See* letter of the General Counsel of the Committee on House Administration dated December 3, 1976. (App. D, p. 53a, *infra*).

[10] That protected right has been defined as the public's "right and privilege to express by their votes their choice of a candidate . . . and their right to have their expression of choice given full value and effect by not having their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots fradulently cast and counted, recorded, returned and certified." *United States* v. *Saylor,* 322 U.S. 385, 386 (1944).

[11] The Texas contest proceeding was halted before the introduction of evidence. In support of his pleadings in the Texas Supreme Court, however, Paul submitted affidavit testimony that in twenty heavily pro-Gammage precincts there were 149 more votes counted than there were persons voting; that approximately 500 persons who supposedly voted could not be found after the election; that there were 25 persons voting who were not residents of the State of Texas; and that there were various oher indications of fictitious voting. Reply of Paul, Cause No. B-6542, Supreme Court of Texas, Exhibits No. 1, 7. *See* the dissenting opinion of Justice Yarbrough (App. A, pp. 13a-14a, *infra*).

is as vital to the franchise as access to the ballot box. *Reynolds* v. *Sims, supra.*

The Constitution contemplates that the protection of this fundamental right is, in the first instance, the responsibility of the states even where elections for federal offices are concerned. Article I, Section 2, provides that the states effectively may prescribe the qualifications of electors for the House of Representatives, and Article I, Section 4, empowers the states to prescribe the times, places, and manner of holding congressional elections. Subject only to a power of Congress not here exercised to revise state-prescribed procedures, the role of the states in federal elections is one of the most important underpinnings of the federal system. *See, e.g.,* THE FEDERALIST, No. 59 at 399—400 (Cooke ed 1961). Under Article I, Section 4, the states have broad power over the conduct of elections, including "supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes," and other similar matters. *Smiley* v. *Holm,* 285 U.S. 355, 366 (1932).

This division of responsibility over the electoral process is itself an important safeguard of the integrity of federal elections. The decision below, however, constitutes a serious incursion into state power, derived from Article 1, Section 4, to protect voting rights. It would permit the states to protect their citizens from official error in tabulation, but would forbid the protection of the franchise from illegal conduct which can render any tabulation meaningless.

This Court has consistently held that the integrity of the political process is a fundamentally important value. *Buckley* v. *Valeo,* 424 U.S. 1, 25-28 (1976); *Civil Service Comm'n* v. *Letter Carriers,* 413 U.S. 548, 565 (1973). In those cases, statutes were upheld against claims of infringe-

ment of First Amendment rights. Here, however, the right of the people of Texas to have the election fairly decided is a right that itself has roots in the First Amendment. *See, e.g., Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971); *Rosario* v. *Rockefeller,* 410 U.S. 752, 760-61 (1973). Surely the interest in the integrity of the electoral process is all the more compelling when that interest coincides with the exercise of First Amendment rights.

In Texas and elsewhere, the effect of the decision below would be immediate and grave. There would be no state review of fraud or misconduct, regardless of how serious or obvious. State participation in the verification of the election results would be limited to inspection of the ballots themselves.[12] In the entire election process there would be no state review of the acts of local officials, and even obvious and deliberate error could not change the official state declaration of its election results. Until this issue is resolved, candidates will be reluctant to pursue state remedies the sole result of which may be delay, expense, and even forfeiture.[13]

If this decision is allowed to stand, the only avenue open for a review of improprieties in a congressional election will be the limited provisions of the Federal Contested Elections

[12] TEX. ELEC. CODE ANN. arts. 7.14(19) (voting machines), 7.15(23) (punch-cards counted electronically), and 9.38a (paper ballots) provide only for numerical recount of the votes. They make no provision for introducing evidence regarding the conduct of the election.

[13] In the instant case, petitioner requested the Committee on House Administration to stay proceedings pending completion of state procedures. He requested that if it were determined that the Texas courts lacked jurisdiction, an extension of time to use evidentiary procedures of the Federal Contested Election Act be granted. 2 U.S.C. §§ 381 *et seq.* The initial 30-day discovery period under that act expired while the Texas courts decided the question of jurisdiction. Because of stays on discovery in state court, the petitioner may well have been denied any effective opportunity to obtain or introduce evidence in either forum.

Act.[14] This would place the entire burden of investigating local elections on the House of Representatives, which is primarily a legislative body and is ill-equipped to undertake a judicial workload of such magnitude. The abolition of state contest procedures would deprive the citizens of the protection of the government closest to the problem and most able to afford a practical remedy. But it would also deprive Congress of the aid of the states in investigating and determining questions as to the legality of federal elections.[15]

An election contest provision, like a recount provision, is an integral part of the election machinery of Texas and many other states, and just as the very existence of a visible and local remedy discourages misconduct, its abolition will be an invitation to the unscrupulous. Our national commitment to popular participation in government is reflected by the elimination of many restrictions on registration and qualification. Yet the very measures necessary to encourage ease of access to the ballot box in an increasingly mobile and urban society give new importance to such post-election safeguards as the election contest.

This is the first reported case to question the constitutionality of state contests since this Court's decision in *Roudebush.* Because the decision below is based on federal constitutional grounds, neither the legislature nor the people of the state can restore the contest provision. The

[14] 2 U.S.C. §§ 381 *et seq.* The act was intended only to remedy procedural deficiencies. 1969 U.S. CODE CONG. & AD. NEWS 1458-59. The seating of a member may also be challenged outside of that act by motion or petition. Without an opportunity to compel testimony, however, there would be no practical way to obtain supporting evidence.

[15] Indeed, "the 50 states would become little more than impotent figureheads" if the states, which establish electoral systems, cannot insure that those systems operate as intended. *Oregon* v. *Mitchell,* 400 U.S. 112, 126 (1970) (Black, J.).

importance of the issue to Texas and to the nation warrants an early review and resolution by this Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

FITZHUGH PANNILL
CARY V. SORENSEN
AUSTIN & ARNETT
1938 Bank of the Southwest Building
Houston, Texas 77002
(713) 652-5007

WILLIAM H. ALLEN
JOHN R. BOLTON
COVINGTON & BURLING
888 Sixteenth Street N.W.
Washington, D.C. 20006
(202) 452-6000
Attorneys for Petitioner Ron Paul

Of Counsel:

F. HASTINGS PANNILL
4600 Post Oak Place, Suite 207
Houston, Texas 77027

BERTRAND C. MOSER
400 Houston Bar Center Building
Houston, Texas 77002

INDEX TO APPENDICES

APPENDIX A

IN THE

Supreme Court of Texas

No. B-6542

ROBERT ALTON GAMMAGE,
Relator,

v.

THE HONORABLE JOHN L. COMPTON, ET AL.,
Respondents.

ORIGINAL MANDAMUS PROCEEDING

This is a mandamus proceeding which arises out of a suit filed by Ron Paul against Robert Alton Gammage in the 151st Judicial District Court seeking to contest the election in which Gammage has been declared to be winner over Paul for Congressman for the 22d Congressional District of Texas.

Relator Gammage seeks to have this Court mandamus the Respondent, Honorable John L. Compton, Judge of said Court, to vacate certain orders relating to further deposing of Gammage by counsel for Respondent Paul, to grant such further relief as the Court deems requisite and proper, and to direct the Respondent Paul to cease and desist from pursuit of this election contest under State court procedures. The principal question is whether the district court has jurisdiction over the contest under Article 9.01 of the Texas Election Code.[1]

[1] All statutory references are to Vernon's Annotated Texas Election Code, unless otherwise noted.

At the general election on November 2, 1976, Gammage was declared winner over the incumbent, Paul. A recount was requested by Respondent Paul and it was conducted under the general observation of inspectors from the office of the Texas Secretary of State and counsel from the Privileges and Elections Subcommittee of the United States House of Representatives. The recount showed Gammage to be the winner by 268 votes, and on November 22, 1976, Gammage was certified by the Governor as having won the election. Thereafter, Paul filed this contest in the District Court of Harris County as well as a notice of contest with the United States House of Representatives under the Contested Elections Act, 2 U.S.C. § 381, et seq.

On January 4, 1977, Gammage was unconditionally sworn in as a member of the House. He then filed a motion to dismiss this court proceeding, and it was denied on January 12, 1977. On January 25th, this Court refused Gammage's motion for leave to file a petition for writ of mandamus to order a dismissal of the suit. Thereafter the trial court ordered Gammage to appear on February 12, 1977, to be further deposed by counsel for Paul. Whereupon, Gammage sought and was granted permission to file this petition for writ of mandamus and writ of prohibition.

Relator's principal contention is that Article 9.01, if interpreted as applying to members of Congress, is violative of Article I, §5, of the Constitution of the United States. The pertinent portion of Article 9.01 reads:

> "The district court shall have *original and exclusive jurisdiction of all contests of elections,* general or special, *for all* school, municipal, precinct, county, district, state offices, or *federal offices,* except elections for the offices of Governor, Lieutenant Governor, Comptroller of Public Accounts, Treasurer, Commissioner of the

General Land Office, Attorney General, and Members of the Legislature." (Emphasis supplied.)

Respondent Paul insists that "federal offices," as used in the foregoing quotation from Article 9.01, includes members of Congress. His interpretation is as though the Article read:

> "The district court shall have *original and exclusive jurisdiction of all contests of elections,* general or special, *for* all school, municipal, precinct, county, district, state offices, or *federal offices, including members of each House of the United States Congress* . . . ." (Emphasis supplied.)

Article I, § 5, of the Constitution of the United States, on the other hand, provides that:

> "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."

Both federal and state courts have recognized that the foregoing provision gives final and exclusive jurisdiction to each House of Congress to determine election contests relating to its members. *Roudebush* v. *Hartke,* 405 U.S. 15 (1972); *Barry* v. *United States ex rel. Cunningham,* 279 U.S. 597 (1929); *Manion* v. *Holzman,* 379 F.2d 843 (7th Cir. 1967); *Rogers* v. *Barnes,* 172 Colo. 550, 474 P.2d 610 (1970); *Burchell* v. *State Board of Election Commissioners,* 252 Ky. 823, 68 S.W.2d 427 (1934); *Belknap* v. *Board of Canvassers of Ionia County,* 94 Mich. 516, 54 N.W. 376 (1893); *McLeod* v. *Kelly,* 304 Mich. 120, 7 N.W.2d 240 (1942); *In re Williams' Contest,* 198 Minn. 516, 270 N.W. 586 (1936); *Odegard* v. *Olson,* 264 Minn. 439, 119 N.W.2d 717 (1963); *Laxalt* v. *Cannon,* 80 Nev. 588, 397 P.2d 466 (1964); *Smith* v. *Polk,* 135 Ohio St. 70, 19 N.E.2d 281 (1939).

In *Barry* v. *Cunningham, supra,* the Supreme Court of the United States referred to this power of each House of Congress as "sole authority under the Constitution to judge of the elections, returns and qualifications of its members . . .", 279 U.S. at 619. In *Rogers* v. *Barnes, supra,* the Colorado Supreme Court, speaking of the jurisdiction of the House and Senate in such contests, stated:

> "Such jurisdiction being exclusive, no other body, including this Court, has the jurisdiction to hear and determine an election contest arising out of a general election for those two national offices." 474 P.2d at 612.

In *Odegard* v. *Olson,* 119 N.W.2d 717 (Minn. 1963), the contestant in an election for the United States House of Representatives sought to enjoin the Secretary of State of the State of Minnesota from issuing a certificate of election to the contestee. The court denied such petition, stating:

> "While the state legislature may regulate the conduct of elections subject to the limitations expressed in the U.S. Const., art. 1, § 4, it should be conceded that under the provisions of art. I, § 5, each house of Congress is the sole judge of the election, returns and qualifications of its members, exclusive of every other tribunal, including the courts." 119 N.W.2d at 719.

Article 9.01 of the Texas Election Code, as interpreted by Respondent Paul, is in diametrical conflict with and contrary to Article I, § 5, of the United States Constitution. Because of this clear and obvious conflict, it is reasonable to believe that the Legislature did not intend for the term "federal offices" to apply to members of Congress. Predecessor election contest statutes did not include federal offices.[2] The term was first used in the election contest statute enacted in 1951 as part of a 95 page revision of the entire

[2] See Acts 1895, p. 58; R.S. 1911, Art. 3046; R.S. 1925, Art. 3041.

election code.[3] The revised election code was drafted by a commission of nine persons appointed under authority of the Fifty-first Legislature in 1950, with Judge Abner McCall as chairman and Dr. A. P. Cagle as counsel.[4] It was introduced as House Bill 6 of the Fifty-second Legislature in 1951. However, the inclusion of "federal offices" in Section 129 (now Art. 9.01) was not a recommendation of the revision commission and neither was the term included in House Bill 6 as introduced. The term "federal offices" was inserted in Sec. 129 of the committee substitute for H.B. 6 when the substitute was adopted by the House Committee on Privileges, Suffrage, and Elections. The committee substitute was enacted in both Houses without a separate vote of any nature relating to the term "federal offices." None of this legislative history is helpful in determining the meaning and intent of the term, but it does reveal that its inclusion was not a studied recommendation of the revision commission and that it was not one of the major items of consideration by the Legislature in adopting the revised election code.

In any event, as to members of Congress, Article 9.01 is unconstitutional and inapplicable. In this connection, it is significant that since 1951 there is no other reported case in which a party sought to contest a general or special election for the House or Senate of the United States under the terms of this statute.

Respondent Paul argues that the Supreme Court's decision in *Roudebush* v. *Hartke, supra,* sanctions this type

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[3] Acts 1951, 52nd Leg., ch. 492, pp. 1097-1194. Article 9.01 was enacted as Section 129 of the Act.

[4] See McCall, "History of Texas Election Laws," 9 Vernon's Annotated Texas Election Code (1952), XVII, XXVIII-XXXVI, for an explanation of the background of the commission's appointment, its activities, and major changes recommended and enacted.

of election contest in a State court so long as it does not interfere in any manner with a final determination of the contest by the United States House of Representatives. There are many differences between this case and the *Hartke* case. In the first place, Indiana's recount statute and procedure was all that was involved in *Hartke*. Indiana was not operating under a statute which attempted to vest in its courts "original and exclusive jurisdiction of all contests of elections" to the House and Senate of the United States Congress. Furthermore, Hartke had been conditionally seated by the Senate "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order . . . ." Gammage had already been through a somewhat similar recount in accordance with Texas law before he was certified as the duly elected Congressman, and he was seated by the House unconditionally.

A portion of the Indiana election process (the statutory recount) was not finished when Hartke was conditionally seated in the Senate, while the election process, including the recount, had been completed in Texas before Gammage was unconditionally seated in the House. This is important because the Constitution of the United States leaves the manner of holding elections for United States Senators and Representatives up to the States, subject to change by Congress.[5] The Supreme Court made it quite clear that

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[5] U.S. Const., Art. I, §4, provides in pertinent part:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

the question in *Hartke* was not to which of the candidates the office belonged.[6] The Court said:

> "... Which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question — a question that would not have been the business of this Court even before the Senate acted. The actual question before us, however, is a different one. It is whether an Indiana recount of the votes in the 1970 election is a valid exercise of the State's power, under Art. I, § 4, to prescribe the times, places, and manner of holding elections, or is a forbidden infringement upon the Senate's power under Art. I, § 5." 405 U.S. at 19.

The Court then held that "a recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I § 4," but it hastened to recognize the Senate's power to make a final decision by adding: "A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conduct its own recount." 405 U.S. at 25-26. The Court had previously said that the limited responsibilities involved in the recount did not constitute a "court proceeding" within the meaning of Title 28 U.S.C. § 2283, stating with reference to the Indiana procedure:

> "When it grants a petition [for recount if correct in form], the court is required to appoint three commissioners to carry out the recount. Once these appointments are made, the Indiana Court has no other responsibilities or powers." 405 U.S. at 21.

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[6] In the present case Respondent Paul seeks such an election contest decision under Article 9.01 et seq. after the election process was over. Art. 9.14, for instance, directs the trial judge, after hearing the contest, to "decide to which of the contesting parties the office belongs."

Thus, the *Hartke* case lends no support to the validity of Article 9.01 or to the all-out election contest which Respondent Paul seeks to wage thereunder for a determination of "to whom the office belongs." This does not mean that Paul is without an adequate and constitutional remedy to press his contest. Congress has enacted a comprehensive procedure in 2 U.S.C.A. § 381 et seq., by which he can obtain evidence, depose witnesses, and have every allegation heard by the House of Representatives. Although termed the "Federal Contested Elections Act," the procedures apply only to contests of elections to the House of Representatives. Respondent Paul has filed his contest under this Act and it is now pending in a House Committee. He concedes that the House will make the final decision of the contest even if the State court had jurisdiction to try the contest.

We hold that Article 9.01 of the Texas Election Code is inapplicable to contests of elections of members of Congress, and any attempt to apply it to congressional elections would be in violation of Article I § 5 of the Constitution of the United States.

Accordingly, it is the judgment of this Court that the Judge of the 151st District Court of Harris County should dismiss the election contest pending in Cause No. 1,103,064 between Ron Paul and Robert Alton Gammage, and the Respondent, Ron Paul, should be prohibited from pursuing this election contest in the courts of this State under Article 9.01 et seq. of the Texas Election Code. The clerk of this Court will issue a writ of mandamus to the Honorable John L. Compton and a writ of prohibition to Ron Paul, if, and only if, either should be necessary to enforce the

judgment of this Court. Because of the time element involved, no motion for rehearing will be entertained.

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Price Daniel
Justice

Dissenting opinion by Justice Reavley in which Justice Denton joins.

Dissenting opinion by Justice Yarbrough in which Justice Steakley joins.

Opinion delivered: March 2, 1977.

IN THE
SUPREME COURT OF TEXAS

No. B-6542

ROBERT ALTON GAMMAGE,
Relator,

v.

THE HONORABLE JOHN L. COMPTON, ET AL.,
Respondent.

ORIGINAL MANDAMUS

DISSENTING OPINION

I do not agree that Article 9.01 of the Texas Election Code is in conflict with and contrary to Article I, § 5, of the United States Constitution. There is no reason why the State of Texas may not protect and enforce its election procedures by permitting election contest actions in court — just so long as these actions do not impede an independent determination of the election result by the United States Congress. In the event Congress decides to make its own investigation and/or determination apart from the judgment of the Texas courts according to Texas statutes, Congress may do so. That possibility and the final authority of Congress do not bar Texas entirely from a role in insuring the legal outcome of its elections. This is the construction which I understand the federal courts now give to this section of the United States Constitution. Roudebush v. Hartke, 405 U.S. 15 (1972); Durkin v. Snow, 403 F. Supp. 18 (D.N.H. 1974).

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Thomas M. Reavley
Associate Justice

Associate Justice Denton joins in this Dissent.
OPINION DELIVERED: March 2, 1977.

IN THE
SUPREME COURT OF TEXAS

No. B-6542

ROBERT ALTON GAMMAGE,
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THE HONORABLE JOHN L. COMPTON, ET AL.,
Respondent.

ORIGINAL MANDAMUS PROCEEDING

DISSENTING OPINION

I respectfully dissent.

This action for mandamus arises out of an election contest filed against Relator Gammage by Respondent Paul seeking to contest in state court the election of Robert Alton Gammage to the office of the United States House of Representatives for the 22nd Congressional District of Texas.

On November 2, 1976, Gammage defeated the incumbent Paul in the race for Representative for the 22nd Congressional District of Texas. Under the provisions of the Texas Election Code, article 7.15, § 23, a recount was conducted under the general observation of counsel from the Privileges and Elections Subcommittee of the United States House of Representatives Administration Committee. The recount showed Gammage the winner by 268 votes. He was thereafter certified as having won the election by the Secretary of the State of Texas.

Paul filed a notice of contest in state district court under the provisions of article 9.03 of the Texas Election Code.

That cause, number 1,103,064, is now pending in the 151st District, Respondent the Honorable John L. Compton, presiding. Pursuant to 2 U.S.C. §381 *et seq.* (1970), Paul also filed a notice to contest the election in the House of Representatives. The matter is pending before the United States House of Representatives Administration Committee.

On January 4, 1977, Gammage was sworn in as the Representative for the 22nd Congressional District of Texas. Immediately afterward, Gammage filed a motion to dismiss the state court action for lack of jurisdiction over the contest. The motion was denied on January 12, 1977 and Paul proceeded with discovery in cause number 1,103,064.

At a hearing on February 7, 1977, Paul presented to the trial court his Motion to Compel the Oral Deposition of Gammage. The trial court granted the motion, but, at the instance of Gammage, scheduled the deposition for Saturday, February 12, 1977, and ordered that it be taken in Gammage's office in Washington, D.C.

On February 9, 1977, this Court granted Gammage leave to file his Petition for Writ of Mandamus, which sought to have the order compelling his oral deposition set aside and/or the action dismissed in the trial court. All proceedings in the trial court have been stayed. Paul has requested that this Court immediately dissolve or modify its stay order so that he can prepare for and proceed to trial.

In argument before this Court, Paul claimed knowledge of at least 500 persons who illegally voted for Gammage in the November 2, 1976, election; of over 300 ballots that were miscounted for Relator from Fort Bend County alone; of at least 300 persons who supposedly voted but who cannot now be found, and of a number of voters who allegedly

were either residents of other states or not physically present within the state on election day. Additionally, it is alleged that in 20 Harris County precincts originally carried for Gammage by very substantial margins, 149 more votes were counted than there were persons voting. Paul also complains of irregularity in the counting of absentee ballots, asserting that the election judge involved in the initial handling and counting of the absentee ballots was a paid employee of Gammage.

In his petition for writ of mandamus Gammage contends:

1. Article I, § 5, of the United States Constitution, places sole and exclusive jurisdiction in each House of Congress to determine the elections, returns, and qualifications of its own members, and therefore an election contest conducted in a state court infringes on the powers of Congress.

2. Because the House of Representatives will make the final decision of which candidate will be seated, any decision by a state court on this issue would be advisory only. Since the Texas Constitution prohibits "advisory opinions," the district court is without jurisdiction.

3. The Federal Contested Election Act, 2 U.S.C. § 381 *et seq.* (1970), preempts consideration by a state court of any contest of an election for the United States House of Representatives.

4. The state statutes relating to "election contests" fail to specify the relief to be granted by the district court upon the determination of the contest.

5. The Rules of Civil Procedure do not authorize the pretrial discovery deposition of Gammage in an election contest.

1.

Article I, § 5 of the United States Constitution provides that each House shall be the judge of the elections, returns and qualifications of its own members. Article I, section 4 provides that "[t]he Times, Places and Manner of holding Elections for ... Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations...."

In this controversy, we are called upon to determine whether the proceeding contemplated by Judge Compton, as presiding judge of the 151st Judicial District Court is a forbidden infringement on the power of the House of Representatives under article I, § 5, or the valid exercise of the state's power under article I, § 4, to describe the times, places and manner of holding elections.

To be sure, the power of the House of Representatives to seat a candidate is a non-justiciable political question — a question that would not have been the business of this or any other court. *See Roudebush* v. *Hartke*, 405 U.S. 15, 19, 92 S.Ct. 804, 807, 31 L.Ed.2d 1, 8 (1972).

As I understand it, however, the question of who is or who is not to be seated by the Congress of the United States is not before Judge Compton. Rather he is requested to decide those certain questions and issues which have come to typify and characterize an "election contest," namely: how many votes were lawfully cast in a state supervised and sanctioned election, and how many votes were illegally cast; how many votes were lawfully counted by and for whom, and similarly, how many votes were illegally counted, if any. Such an inquiry may ultimately address substantive questions and issues regarding the registration of those within the district who purported to vote,

the integrity and accuracy of the vote inspectors and canvassers in the procedural discharge of their duties in both the counting and recounting of votes, and in the making and publication of a proper return. While the answers to these issues may be of interest to the Congress in its ultimate determination of who shall be seated, Congress is not bound by the answer to any of them. But these inquiries are clearly of direct concern and interest to the state in the administration and enforcement of the election laws pursuant to which the voters of District 22 were to select, in democratic fashion, their own congressional spokesman.

Chief Justice Hughes, writing in *Smiley* v. *Holm*, 285 U.S. 355, 366, 52 S.Ct. 397, 399, 76 L.Ed. 795, 800 (1932), both recognized and defined the breadth of the permissible state powers under article I, § 4:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.

This writing of Justice Hughes enumerates those functions which are the subject of the election contest proceeding now pending before Judge Compton.

Texas has found, along with many other states, that among the procedures necessary to guard against irregularity and error in the determination of election results is the availability of both a recount and, if necessary, an election contest. Despite the fact that a certification of

election may be issued to the leading candidate within 17 days after the election, the results are not final if a candidate's option to initiate a contest is exercised.[1]

It is true that a state's verification of the accuracy of election results pursuant to its article I, § 4 powers is not totally severable from the power of the House of Representatives to judge elections and returns. But a recount or an election contest can be said to "usurp" the function of the House only if it frustrates the ability of the House to make an independent final judgment. An election contest does not prevent the House of Representatives from independently evaluating the election any more than does the initially announced election result. The House is free to accept or reject the apparent winner in either count, and if it chooses, to conduct its own inquiry into the substantive issues of the contest. Such were the principles announced by the Supreme Court of the United States in *Roudebush* v. *Hartke*, 405 U.S. 15, S.Ct. 804, 31 L.Ed.2d 1 (1972), when

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[1] TEX. ELECTION CODE ANN. art. 8.38 (1967) requires the Secretary of State to open and count the returns of the election on the seventeenth day after the election, the day of election excluded, in the presence of the Governor and one other citizen.

TEX. ELECTION CODE ANN. art. 8.39 (1967) provides:

"When the returns have been counted, the Governor shall immediately make out, sign and deliver a certificate of election, with the seal of the State thereto affixed, to the person or persons who shall have received the highest number of votes for each or any of said offices."

TEX ELECTION CODE ANN. art. 9.03 (1967), provides:

"Any person intending to contest the election of any one holding a certificate of election for any office mentioned in this law, shall, within thirty (30) days after the return day of election, give him a notice thereof in writing and deliver to him, his agent or attorney, a written statement of the ground on which such contestant relies to sustain such contest. By the "return day" is meant the day on which the votes cast in said election are counted and the official result thereof declared."

that court considered the question of whether an Indiana recount of the votes in a 1970 senatorial election was a valid exercise of the state's power under article I, § 4, or an infringement upon the Senate's power under article I, §5. That Court held that such recount was the province of the state pursuant to article I, §4. I see little reason for distinguishing between an exhaustive election contest concerned with the substantive procedures of the election, and a mere cursory recount; their objectives are identical, i.e. to determine and designate the most popular candidate.

An election contest is an integral part of the Texas electoral process and is within the ambit of the broad powers delegated to the state by article I, §4 of the United States Constitution.

2.

Gammage also attacks article 9.01 of the Texas Election Code, categorizing that provision as an invalid attempt by the legislature to authorize an advisory opinion. The district court cannot finally determine who should represent the 22nd District because Congress has final authority to judge elections, qualifications, and returns of its members. Therefore, so the argument goes, any ruling by the district court in a Congressional contest would be an advisory opinion beyond the constitutional power of the court.

This argument misconstrues the nature and purpose of an election contest, the constitutional provision authorizing same, and the basis for the prior decisions of this Court invalidating advisory opinions.

At least in a democracy, an election is more than a periodic inconvenience to both the electorate and to those who would continue to hold political office. All recognize that it provides the mechanism for popular choice of both candidates and parties, but it also registers the philosophical

viewpoint supported by a plurality of those who vote, as well as the degree of support enjoyed by minority interests. It provides a forum for public participation in politics, and thereby affords an educational opportunity for both those who become active partisans and those who are affected by such partisan activity. And it serves to peacefully resolve social conflicts: majority and minority groups alike are more willing to accept exercises of the state's coercive powers and to obey state laws when the state officials have been chosen by the People in a fair process. While the objective of an election may be to select the most popular candidate, its vital function is to legitimize governmental authority. An election is the means by which the rudder of the Ship of State is altered, if ever so slightly, and the philosophical course of our government is thereby determined. Without such legitimization, there is no duly constituted government, and the inherent right of the People to open revolution has historically been the inevitable alternative.

Those persons who participated in the election are entitled to an orderly declaration of the final results of that political event, without regard to the question of which candidate shall be seated by Congress.

Paul paid a filing fee, or otherwise qualified himself, in order to stand for election on the basis of philosophical and personal views in contrast to those of his opponent, Gammage. He did so with considerable support from a large contingent of the eligible voters of the 22nd Congressional District, who collectively appear to have exerted themselves, both physically and financially, all in confident reliance upon an implied assurance from the State of Texas that the election, to which they sought to dedicate themselves, would be conducted in an honest, fair and otherwise impartial manner, and in accordance with the

law, as codified, in part, by the Texas Election Code. There is now a concomitant duty, on the part of the State, to determine the integrity of that election process, and thereby reassure all citizens, including Respondent Paul and his supporters, that their confidence is well placed. And that duty is independent of anything that Congress does, or does not do.

In this regard, an election contest is an end in-and-of itself, which is accomplished when the results of the election, and the right to the certificate of election, are declared by the district court. Congress cannot decide how this state declares an election or to whom the Texas certificate is to be delivered. These decisions are accomplished — not recommended or advised — by the Texas election contest proceeding.

The reasoning of the prior cases invalidating advisory opinions is clear and consistent: a court cannot give advice because the constitutional provisions granting its jurisdiction do not permit it. They are restricted to the exercise of "judicial power," which "is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for a decision." *Morrow* v. *Corbin,* 122 Tex. 553, 62 S.W.2d 641, 644 (1933). In every instance, however, the restriction of the courts to cases, controversies, parties, and judgments — to the judicial functions — results from the intention of the framers expressed in the provisions of the Texas Constitution.

I believe that the legislative history of both the constitutional and statutory provisions relating to election contests conclusively indicates that an election contest is an exception to the general rule that the district court is restricted to judicial functions, and to the necessity of parties, binding judgments, or controversies.

Originally, this Court held that the contest of an election is not within the judicial power granted to the courts of this state by the Texas Constitution. *Ex Parte Towles,* 48 Tex. 413 (1878); *Williamson* v. *Lane,* 52 Tex. 335 (1879); *Ex Parte Whitlow,* 59 Tex. 273 (1883). In *Williamson* v. *Lane, supra,* this Court construed the predecessor of the current election contest provisions of our election code. Tex. Laws 1873, ch. 50, at 67, 7 H. GAMMEL, LAWS OF TEXAS 519 (1871), *as amended,* Tex. Laws 1876, ch. 65, at 70, 8 H. GAMMEL, LAWS OF TEXAS 906 (1874). The statute there construed is remarkably similar to our current contest provisions.

Article 5, § 8 of the Constitution of 1876, which granted jurisdiction to the district court, was also much the same as the same numbered provision of the present Constitution. The 1876 Constitution contains the same general grant of the judicial power:

> The District Court shall have original jurisdiction . . . of all suits, complaints or pleas whatsoever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; and the said courts and the judges thereof shall have power to issue writs of *habeas corpus* in felony cases, *mandamus,* injunction, *certiorari,* and all writs necessary to enforce their jurisdiction.
>
> TEX. CONST., art. 5, § 8 (1876) (emphasis in original).

This Court held in *Williamson* v. *Lane, supra,* that the general grant of judicial power as contained in the 1876 Constitution Proviso, did not confer jurisdiction over the "election contests" provided in the predecessor statute:

> This leads us to the inquiry, whether the contest of an election authorized by the act of May 8, 1873, regulating contested elections, and the act to amend

the same, approved July 20, 1876 (Gen. Laws, 13th Leg., p. 67; Gen. Laws, 15th Leg., p. 70) under and by virtue of which this proceeding was instituted and conducted, can be held to be either a suit, complaint, or plea in the sense in which these words are evidently used in the Constitution? These acts themselves, in my opinion, plainly answer this question in the negative.

That the right to an office may be, and has often been, the subject of a suit, cannot be questioned; but that the declared result of an election by the officer to whom this duty is intrusted, and the resultant right to the certificate of election, may be contested otherwise than by an action, or suit, or proceeding before a judicial officer or tribunal, is certainly as equally well established.

The right to an elective office, as every one will admit, results from the legally-expressed choice of a majority of the electors; but how this choice is to be legally expressed and ascertained is a matter of legislative discretion and determination. If the Legislature should see fit to do so, unless restrained by some constitutional provision, it may make the declared result by the officer by whom the election is conducted final and conclusive upon all parties, or may authorize a review of the action of this officer by some other executive officer or commission, or intrust its determination to an existing judicial tribunal, if its constitutional jurisdiction will warrant its taking cognizance of it, and if not, it may, under our present Constitution, create one for this purpose. (Const., art. 5, sec. 1.)

In the case of *Rogers* v. *Johns,* 42 Tex. 339, the court again held that the determination of the result of an election is not a matter pertaining to the ordinary jurisdiction of the law in courts of justice. *It is in the nature of a political question, to be regulated, under the Constitution, by the political authority of the State.* (Emphasis added)

Williamson v. *Lane, supra,* 52 Tex. at 344-346 (emphasis added).

In *Ex Parte Whitlow,* 59 Tex. 273 (1883), this Court

relied upon the *Williamson* case to hold invalid a provision for contesting an election for county seat.

When the Constitution was subsequently revised in 1891, however, the courts were given jurisdiction over contested elections regardless of their non-judicial nature:

> The District Court shall have original jurisdiction ... of all suits, complaints or pleas whatever, without regard to any distinction between law and equity, when the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of *contested elections,* and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction.
>
> TEX. CONST., art. 5, § 8 (emphasis added).

Pursuant to the above provision, the Texas Legislature has enacted and reenacted a comprehensive election code. Section 9.01 of this code grants the district court the power and entrusts it with the duty to hear election contests involving "federal offices," which term, by its plain and ordinary meaning, includes United States Congressional elections held within this state:

> The district court shall have original and exclusive jurisdiction of *all contests* of elections, general or special, *for all* school, municipal, precinct, county, district, state offices, or *federal offices,* except elections for the offices of Governor, Lieutenant Governor, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, Attorney General, and Members of the Legislature....
>
> TEX. ELECTION CODE ANN. art. 9.01 (1967) (emphasis added).

In light of the language of *Williamson, supra,* the subsequent amendment of article 5, § 8, to include election

contests seems to have been clearly intended to grant a non-judicial, political, and declaratory power to the district court. This is further evidenced by the fact that the amendment does not refer to cases arising out of elections, or controversies involving them, but merely grants jurisdiction "of contested elections." We must presume that the amendment of section 8 in 1891 was made with knowledge of this Court's holding as to the nature, purpose, and effect of "contested elections" as expressed in *Williamson*. The district court was given power to determine election contests as defined by this Court at the time: as non-judicial, declaratory, and not necessarily creating any immediate right to office.

The jurisdiction of the district court is unaffected by whether or not the election contest proceeding will determine the right to a congressional office. That is not the purpose of this proceeding. And if an act requires the district court to perform non-judicial *functions*, that act is clearly valid because the district court has also been entrusted with non-judicial *powers*.

3.

Relator argues that Congress, by enacting the Federal Contested Elections Act, 2 U.S.C. §381 *et seq.* (1970), has preempted contests of federal elections in state courts. If such preemption has occurred, the supremacy clause of the United States Constitution restrains any action by the courts of this state. *Hines* v. *Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941). In my opinion, however, the federal statute presents no impediment to an election contest in a state court.

In order for preemption to occur, either the federal statute must express a Congressional design to "occupy the field," or there must be an actual conflict between the federal and state statutory scheme such that both cannot stand in the same area. *Florida Lime and Avacado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248, 256 (1963). The case before us is not one in which the federal statute by its terms expresses an intent to occupy exclusively an area. *See, e.g., Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). The question, then, is whether we should imply such an intent on the part of Congress.

The Federal Contested Elections Act revises the procedures followed by the parties to an election contest in the House of Representatives. The Act establishes a comprehensive framework patterned after the Federal Rules of Evidence with the intention of instituting "modern procedures which provide efficient, expeditious processing of the [contested] cases and a full opportunity for both parties to be heard." 1969 U.S. CODE CONG. & ADM. NEWS 1456, 1458-59. Section 382 provides for the filing of notice by the contestant with the clerk of the House. Section 383 sets out the requirements for the contestee's response. Sections 386 to 390 make depositions available to both parties as a discovery tool, as well as establishing sanctions for failure to attend. The Act was not intended to make any changes in the substantive bases for election contests. 115 CONG. REC. 30510 (1969).

I detect no support for the proposition that the Congress intended to preempt this area in either the language of the statute or its legislative history. The comprehensive nature of the House contest procedures is an insufficient basis for such an inference. Congress, being the final judge of the elections of its members, would have created a comprehensive procedure for handling election contests completely apart from any question of preemptive intent. Only in this way could the contest be streamlined, which would

enable the House to resolve the matter and turn to legislative questions. Additionally, the federal statute had to be sufficiently comprehensive to provide discovery techniques. Otherwise, contesting parties from states that, unlike Texas, had no provision for election contest discovery would be unable to secure facts necessary to conduct the contest.

I would decline to adopt a stricter standard for ascertaining Congressional intent to preempt than that promulgated by the United States Supreme Court:

> If Congress is authorized to act in a field it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supercede the exercise of the power of the state unless there is a clear manifestation of the intention to do so. The exercise of federal supremacy is not lightly presumed.

New York Department of Social Services v. *Dublino,* 413 U.S. 405, 413, 93 S.Ct. 2507, 2513, 37 L.Ed.2d 688, 695 (1973), *quoting Schwartz* v. *Texas,* 344 U.S. 199, 202, 203, 73 S.Ct. 232, 235, 97 L.Ed. 231, 235 (1952). Placing the burden on Congress to express its intent to preempt is especially justified when the power of the state is derived from article I, § 4 of the United States Constitution. I would not impute to Congress the intent to exercise its power under the second clause of article I, § 4 without more than is before us in this case.

The second basis for preemption lies in a conflict between federal and state legislation. The case before us does not involve a state standard of action that is more stringent than that of federal law. *See, e.g., Florida Lime and Avocado Growers, Inc.* v. *Paul, supra; Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). Rather, our case involves parallel but separate

proceedings: the state court will determine which party is entitled to receive the certificate, while the House of Representatives will decide who is to be seated. The problem arises because the prevailing party in one of these proceedings will not necessarily also succeed in the other. I do not believe that this is a conflict that stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez* v. *Campbell,* 402 U.S. 637, 649, 91 S.Ct. 1704, 1711, 29 L.Ed.2d 233, 242 (1971); *Hines* v. *Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581, 587 (1941). Conflicting state laws, absent repealing or exclusivity provisions in the federal statute, should be preempted only to the extent necessary to achieve the aims of the federal statute. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware,* 141 U.S. 117, 94 S.Ct. 383, 38 L.Ed.2d 348 (1973).

The objectives of the Federal Contested Election Act are limited to providing an efficient procedure for contests in the House. The existence of an election contest suit in a state court will not hamper the House in applying these procedures to its contest. Nor do articles 9.01-9.38a impinge on the ability of the House to conduct its own contest. The House, having the last word on its membership, will not be bound by any Texas court award of the certificate, although the adjudication made by a state court may actually aid the House in its inquiry. *See* 1969 U.S. CODE CONG. & ADM. NEWS 1456, 1457. In my opinion, both statutory schemes can stand in the same area.

4.

Gammage argues that the state statutes relating to "election contests" as embodied within chapter 9 of the Texas Election Code, are deficient in that such statutes fail to specify the relief to be accorded by the district court upon

the determination of the contest. Gammage contends that while the pertinent "contest statutes" may contemplate a final decision, there is no provision in the entirety of chapter 9 of the Texas Election Code suggesting (i.e. authorizing) that the court may determine or declare that the court may determine or declare that the certificate of election issued by the Secretary of State should be withdrawn, or that the contestee had been wrongly certified.

It is apparent that the general statutory scheme of the Texas Election Code contemplates that when there is doubt about the results of a contested election, the final authority for declaring same rests with the district court, subject to appellate review.[2]

The district court may order the contestant to implead the Secretary of State, the chief elections officer of the state, as a party defendant in accordance with Rule 39, Texas Rules of Civil Procedure. Thereafter, the Secretary of State shall be subject to such orders as the court may enter in enforcing its jurisdiction and resolving the contest, including an order for the issuance of a valid certi-

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[2] TEX. ELECTION CODE ANN. art. 9-14 (1967), provides: "If any vote or votes are found upon the trial of any contested election to be illegal or fraudulent, the trial court shall subtract such vote or votes from the poll of the candidate who received the same . . ."
TEX. ELECTION CODE ANN. art. 9.15 (1967), provides: "If it appears on the trial of any contest [for any district office] that it is impossible to ascertain the true result of the election as to the office about which the contest is made, either from the returns of the election or from any evidence within reach or from the returns considered in connection with other evidence, or should it appear from the evidence that such a number of legal voters were, by the officers or managers of the election, denied the privilege of voting as, had they been allowed to vote, would have materially changed the result, *the court shall adjudge such election void,* and direct the proper officers to order another election to fill said office; which election shall be ordered and held and returns thereof made in all respects as required by the general election laws of the State."

ficate of election to the candidate determined by the court to have received the greatest number of legally cast votes.

5.

Gammage contends that, even if the district court may entertain this action, the court has no authority to order a deposition to be taken because the discovery provisions of the Texas Rules of Civil Procedure are inapplicable to an "election contest." The basis for this contention is Rule 2, which provides in pertinent part:

> These rules shall govern the procedure in the justice, county, district, and appellate courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated.

Gammage argues that "actions of a civil nature" do not include election contests.

It is undisputed that the legislature has the power to make the Rules of Civil Procedure apply to election contests. *See Odell* v. *Wharton,* 87 Tex. 173, 27 S.W. 123 (1894). I believe that they have done so. Both *Odell* v. *Wharton, supra,* and *DeShazo* v. *Webb,* 131 Tex. 108, 113 S.W.2d 519 (1938), which hold that an election contest is not governed by the procedures of a civil suit, were decided prior to the effective date of the Rules of Civil Procedure. Therefore neither case binds our interpretation of the applicability of the Rules. I do not equate the phrase "actions of a civil nature" with "civil suit." Although an election contest is not a civil suit, *Odell* v. *Wharton, supra,* such a contest is an action of a civil nature. I believe that the use of this phrase in Rule 2 was intended to draw a line between criminal proceedings, which would be governed by the Code of Criminal Procedure, and civil proceedings. *Gonzalez* v. *Rodriguez,* 250 S.W.2d 253 (Tex. Civ. App. — San Antonio 1952, no writ). Therefore, to the extent that specific

procedural provisions are not established elsewhere in the Election Code, an election contest, although not a "civil suit," should be governed by discovery procedures in the Rules.

Accordingly, I would not grant the writ of mandamus or the writ of prohibition, and I would allow the deposition of Relator Gammage to proceed under the applicable Rules.

.....

DONALD B. YARBROUGH
Justice

Justice Steakley joins in this dissent.

Opinion delivered March 2, 1977.

APPENDIX B

IN THE
DISTRICT COURT OF HARRIS COUNTY, TEXAS
151ST JUDICIAL DISTRICT

No. 1,103,064

RON PAUL,
Contestant,

v.

ROBERT ALTON GAMMAGE,
Contestee.

ORDER OVERRULING CONTESTEE'S MOTION TO DISMISS

BE IT REMEMBERED that on this date came on to be heard Contestee's Motion to Dismiss and the Court after reviewing the pleadings and hearing arguments of counsel is of the opinion that said Motion should be in all things overruled. It is, therefore,

ORDERED that Contestee's Motion to Dismiss is overruled.

SIGNED and ENTERED on this 17 day of January, 1977.

/s/ JOHN R. COMPTON
Judge John R. Compton
Presiding Judge

APPROVED:

BURNETT & JONES
By: /s/ GENE JONES
GENE JONES
7401 Gulf Freeway
Houston, Texas

Attorney For Contestee

AUSTIN & ARNETT

By: /s/ FITZHUGH H. PANNILL, JR.
FITZHUGH H. PANNILL, JR.
1938 Bank of the Southwest Bldg.
Houston, Texas 77002

Attorneys For Contestant

APPENDIX C

Art. 6.05c Order of offices and names of candidates

SUBDIVISION 1. *Order of state, district, county, and precinct offices.* (a) Whenever there are to appear on the ballot for any general, special, or primary election two or more office titles of offices which are regularly filled at the general election provided for in Section 9 of this code, they shall be listed on the ballot in the following relative order:

Federal offices:
President and Vice President
United States Senator
Congressman-at-Large
United States Representative (district office)

State offices:
(1) Statewide offices:

• • • •

The headings "federal offices" and "state offices" and the subheadings under "state offices" shall not be printed on the ballot.

• • • •

Art. 7.14 Providing for voting machines

SECTION 19. *"Convass of the Returns; Recheck and Comparison.* The returns shall be canvassed in the same manner as returns from precincts where paper ballots are used; provided, however, that at the time of the making of the official canvass, where voting machines are used in an election, at the written request of any candidate whose name appears on the ballot or on the written petition of twenty-five voters of the county, city or other subdivision for which the election was held, the authority charged with the duty of canvassing the returns shall make, in the presence of

a district judge and the county judge of the county in which the election was held, a recheck and comparison of the results shown on the official returns then in process of being canvassed, with the results appearing and registered on the counter dials of each voting machine used in the election for which a request for a recheck has been made. To enable the canvassing authority to make such recheck and comparison, it shall be authorized and empowered to break the seals on each such voting machine. At the conclusion of the recheck and comparison, the voting machine shall again be sealed up, the necessary corrections, if any, shall be made on the returns, and the result of the election shall be declared as shown by the recheck and comparison of the returns of election with counter dials of the voting machines. If voting machines were used which produced a printed record of the votes cast on such machine, candidates and voters shall have the right under the procedure heretofore detailed to have such printed record compared with the counters on the machine from which such printed record was obtained.

Art. 7.15 Providing for Electronic Voting Systems

SUBDIVISION 1. *Purpose.* The purpose of this section is to authorize the use of electronic voting systems in which the voter records his votes by marking or punching a ballot which is so designed that votes may be counted by data processing machines.

• • • •

SUBDIVISION 23. *Post-election examination of program and other materials; recount.* At the time of making the official canvass, where an electronic voting system is used, upon the written request of any candidate whose name appears on the ballot or upon the written request of 25 voters of the county, city, or other subdivision for which the

election was held (hereinafter called the petitioner), the authority charged with the duty of canvassing the returns shall defer a canvass on the office or proposition identified in the request until the procedure outlined in this subdivision has been completed. The request shall be directed to a district judge, with a copy to the presiding officer of the canvassing board. The request may ask for any one or more of the following, and it may be amended to include additional items at any time not later than 48 hours after completion of the procedures originally requested:

(1) Permission to examine the program used in counting the ballots.

(2) Permission to examine the materials used in making the test counts.

(3) Permission to examine the ballot assemblies for all or part of the voting devices, where a punch-card ballot is used.

shall receive for making a corrected recount as outlined in numbered Paragraph (7) of this subdivision. Except for their services in that capacity, the district judge shall require the petitioner to make a deposit to cover estimated costs for their services.

Whenever a recount is ordered, by whatever method it is to be made, each opposing candidate must be given notice of the time and place for making the recount and may be present or have a representative present to observe the proceeding. If the recount is for an election on an issue or proposition, the district judge may order that notice be given to such persons or groups as he deems desirable to provide representation for the opposing interest. The returns made on the recount shall be used in lieu of the original returns in the official canvass of the election for the office or proposition identified in the request; provided, however, that if any

write-in ballots, absentee ballots, or other ballots were not recounted, the original returns shall be used as to those ballots.

If as a result of the recount the outcome of the election is changed favorable to the petitioner, any deposit for costs which the petitioner has made shall be returned to him, and the authority responsible for the expenses of the election shall pay the costs of the recount and shall reimburse the petitioner for any expenditure he has made for equipment and personnel in having the recount made; provided, however, that if the central counting station equipment and personnel were not used, the amount of reimbursement shall not exceed the amount which use of that equipment and personnel would have cost. If the recount does not change the outcome, the petitioner shall pay all costs. A change in the outcome of the election favorable to the petitioner means that as a result of the recount the proposition identified in the request carries, or the candidate identified in the request is declared to have been nominated or elected to the office, or to have become entitled to be a candidate in a runoff election, or to have tied with another candidate between the two of whom the right of nomination, election, or a place on a runoff ballot is to be decided.

(4) Permission to make a recount of the test count, using the program and the test materials.

(5) A recount of the ballots for all or part of the election precincts, using the same methods and materials as in the original count. A recount under this paragraph, or a recount of the test count, shall be made by a person selected and compensated by the petitioner, subject to approval by the district judge as to his competence to operate the electronic tabulating equipment. The recount may be made either on the equipment which was used for the official count at the central counting station or on any tabulating equipment

located within the county which is capable of counting the ballots. If it is made on the equipment at the central counting station, the person in charge of the equipment must make the equipment available at a reasonable rate of compensation, to be paid by the petitioner. The petitioner shall also be responsible for any expense involved in using any other equipment. A return of the results of the recount shall be made and certified by the person making the recount, and shall be attested by the manager and tabulation supervisor of the central counting station.

(6) A manual recount of the votes cast on the office or proposition indentified in the request. The recount shall be made by a committee of two or more persons appointed by the district judge, and they shall be compensated at the same rate as the election judges and clerks for the election. The district judge shall make a preliminary estimate of the cost and shall require the petitioner to make a deposit in that amount before the recount is ordered. A return of the results of the recount shall be made and certified by the committee.

(7) A recount of the ballot for all or part of the election precincts, using corrected materials as detaied herein. If an examination or utilization of the program, the ballot assemblies, or the test count materials reveals an apparent error in the preparation or use of the materials or a defect in the functioning of the equipment which affected the outcome of the election, the petitioner shall make a written report to the district judge, copies of which shall be furnished to the presiding officer of the canvassing authority, the programmer for the election, and the manager, tabulation supervisor, and presiding judge of the central counting station. If the programmer, manager, and tabulation supervisor unanimously agree that the error or defect does exist and that it can be remedied so that the true results of the election can be ascertained, the correction shall be made

under supervision of the district judge; and the manager, tabulation supervisor, and presiding judge shall recount the ballots and prepare corrected returns in the same manner as for the original count. Any other relief incident to an examination of materials and request for a recount under this paragraph must be obtained through an election contest filed in a district court.

Upon presentation of an order signed by the district judge, the custodian of the election records shall deliver them into the custody of the person designated in the order to be responsible for their safekeeping while they are being used. After the use is completed, they shall be returned to the original custodian for safekeeping in the same manner as when they were originally delivered to him. The district judge or someone designated by him to serve in his place and the manager and the tabulation supervisor of the central counting station where the ballots were counted shall be present at all times while the election records are being used. The manager and tabulation supervisor shall be paid at a reasonable rate of compensation for time spent in performing the duties imposed by this subdivision, except that the authority responsible for the expenses of the election shall determine what compensation, if any, they shall receive for making a corrected recount as outlined in numbered Paragraph (7) of this subdivision. Except for their services in that capacity, the district judge shall require the petitioner to make a deposit to cover estimated costs for their services.

Whenever a recount is ordered, by whatever method it is to be made, each opposing candidate must be given notice of the time and place for making the recount and may be present or have a representative present to observe the proceeding. If the recount is for an election on an issue or proposition, the district judge may order that notice be given to

such persons or groups as he deems desirable to provide representation for the opposing interest. The returns made on the recount shall be used in lieu of the original returns in the official canvass of the election for the office or proposition identified in the request; provided, however, that if any write-in ballots, absentee ballots, or other ballots were not recounted, the original returns shall be used as to those ballots.

If as a result of the recount the outcome of the election is changed favorable to the petitioner, any deposit for costs which the petitioner has made shall be returned to him, and the authority responsible for the expenses of the election shall pay the costs of the recount and shall reimburse the petitioner for any expenditure he has made for equipment and personnel in having the recount made; provided, however, that if the central counting station equipment and personnel were not used, the amount of reimbursement shall not exceed the amount which use of that equipment and personnel would have cost. If the recoun does not change the outcome, the petitioner shall pay all costs. A change in the outcome of the election favorable to the petitioner means that as a result of the recount the proposition identified in the request carries, or the candidate identified in the request is declared to have been nominated or elected to the office, or to have become entitled to be a candidate in a runoff election, or to have tied with another candidate between the two of whom the right of nomination, election, or a place on a run-off ballot is to be decided.

Art. 9.01 District court, jurisdiction and venue

The district court shall have original and exclusive jurisdiction of all contests of elections, general or special, for all school, municipal, precinct, county, district, state offices,

or federal offices, except elections for the offices of Governor, Lieutenant Governor, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, Attorney General, and Members of the Legislature.

The venue of suits or contests between candidates for any office to be filled by the choice of voters of the entire state shall be in Travis County. The venue of suits or contests between candidates for any justice of any Court of Civil Appeals shall be in the county where said Court of Civil Appeals has its sittings.

The venue in all other election contests between candidates shall be in the county where the candidate receiving the certificate of election resides. If there is but one district court in the county in which venue is placed by this law and the judge of said court is disqualified to hear any contest, said judge shall be replaced for purposes of said contest in the manner provided by law for civil suits.

Nothing herein shall be construed to prohibit the district court in the county where any such contest may be filed from changing the venue to some adjacent county, upon showing of adequate cause. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 129.

Art. 9.08 Evidence and procedure

In trials of all contests of election, the evidence shall be confined to the issues made by the statement and reply thereto, which statement and reply may be amended as in civil cases. As to the admission and exclusion of evidence, the trial shall be conducted under the rules governing proceedings in civil causes. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 136.

Art. 9.09 To execute bond

Whenever the validity of any election for an officer other than for Members of the Legislature is contested, the contestee shall, within twenty (20) days after the service of said notice and statement of such contest upon him, file with the clerk of the court in which such contest is pending a bond with two (2) or more good and sufficient sureties, payable to the contestant, to be approved by said clerk, in an amount to be fixed by said clerk, and not less than double the probable amount of salary or fees or both, as the case may be, to be realized from the office being contested for a period of two (2) years; conditioned that, in the event the decision of the contest shall be against such contestee and in favor of the contestant, such contestee will pay over to such contestant whatever sum may be adjudged against him by a court having jurisdiction of the subject matter of such bond. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 137.

Art. 9.10 Failure to file bond

If the contestee fails to file the bond as required in the preceding Section [art. 9.09], and within the time therein prescribed, said clerk shall notify the contestant immediately of such failure; and such contestant shall have the right within ten (10) days after such notice, to file a like bond payable to the contestee, conditioned that, in the event the decision of the contest is against him and in favor of the contestee, he will pay over to such contestee whatever sum may be adjudged against him, the said contestant, by a court having jurisdiction of the subject matter of such bond. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 138.

Art. 9.11 Execution of bond by contestant certified

Immediately upon the filing of said bond by the contestant, the clerk shall certify in writing, and under his official seal, to the Governor, that the contestee failed to give the required bond, and that the contestant has given such bond in accordance with law. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 139.

Art. 9.12 To commission contestant

Upon receiving such certificate from the clerk, the Governor shall issue a commission to the said contestant for the office in controversy pending such contest; and thereupon the contestant, upon qualifying in said office as required by law, shall exercise all the rights and powers and perform all the duties of said office for the full term thereof unless it shall otherwise be determined and ordered by the court upon the trial of such contest. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 140.

Art. 9.13 Failure of contestant to execute bond

The Governor shall issue the commission to the contestee at the time provided by law as in other cases, unless he has been notified of the failure of such contestee to file the bond required by Section 137 [art. 9.09], in which event the Governor shall withhold the issuance of such commission until after the time allowed the contestant to file such bond has elapsed; but, if the said contestant shall also fail to file bond as provided in Section 138 [art. 9.10], and within the time therein required, the clerk shall certify all the facts in the case, under his official seal to the Governor, who shall thereupon issue the commission to the contestee. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 141.

Art. 9.14 Fraudulent vote not counted

If any vote or votes are found upon the trial of any contested election to be illegal or fraudulent, the trial court shall subtract such vote or votes from the poll of the candidate who received the same, and after a full and fair investigation of the evidence shall decide to which of the contesting parties the office belongs. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 142.

Art. 9.15 Election declared void

If it appears on the trial of any contest provided for in Section 134 [art. 9.06] that it is impossible to ascertain the true result of the election as to the office about which the contest is made, either from the returns of the election or from any evidence within reach or from the returns considered in connection with other evidence, or should it appear from the evidence that such a number of legal voters were, by the officers or managers of the election, denied the privilege of voting as, had they been allowed to vote, would have materially changed the result, the court shall adjudge such election void, and direct the proper officers to order another election to fill said office; which election shall be ordered and held and returns thereof made in all respects as required by the general election laws of the State. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 143.

Art. 9.38a Recount of paper ballots

Subdivision 1. *Grounds for recount.* (a) A candidate for nomination or election to any public office or to the party office of county chairman or precinct committeeman may obtain a recount of the votes cast for the office on manually counted paper ballots, in the manner outlined in this section:

(1) if the difference in the number of votes received by

him and the next highest candidate above him is less than five percent of the number of votes received by such next highest candidate, as shown by the returns of the election officers, and the candidate seeking the recount would gain the election or nomination or a place on a runoff election ballot if the recount showed him to have received a greater number of votes than that opponent, or

(2) if one or more judges of the election make an uncontradicted affidavit stating that certain ballots cast for the office were counted or were not counted, as the case may be, and the Secretary of State certifies that, on the basis of the statements in the affidavit, the election officers were in error in either counting or failing to count the ballots, as the case may be, and further certifies that from the affidavit or affidavits submitted to him and on the basis of the unofficial returns it appears likely that the number of miscounted ballots were of sufficient number to change the result of the election in that race as it affects the candidate seeking the recount.

(b) If the ground of the application for a recount is that the difference in votes is less than five percent, the request must be for a recount of all the ballots cast for the office in each and every election precinct, including the absentee ballots cast for the office; and the canvassing board shall order a complete recount.

(c) If the ground of the application is that election officers erroneously counted or failed to count certain ballots, the candidate at his option may request a recount of all the ballots cast in the election or only the ballots cast in the election precincts in which the miscounting is alleged to have occurred; and if only a partial recount is requested, the canvassing board shall order a recount only of all the ballots cast in those precincts in which the Secretary of

State certifies that ballots were erroneously counted or not counted.

Subdivision 2. *Procedure for requesting recount; general provisions.* (a) A candidate desiring a recount must file a written, signed application with the presiding officer of the body which canvasses the returns of the election and makes the official declaration of the result (hereinafter called "canvassing board"). The application may be presented for filing at any time after the returns from all election precincts involved have been received from the presiding judges of the election, and it must be presented not later than the second day after the official declaration of the result; provided, however, that if the application is for a partial recount in any election wherein the unofficial returns show that a runoff election for the office involved will be necessary or wherein a runoff would be necessary if the recount changed the result of the election, the application must be filed not later than the fifth day after the day of the election. If the chairman of a state executive committee receives an application under the first ground stated in Subdivision 1 of this section, or receives the certification for a recount from the Secretary of State upon an application filed under the second ground, more than three days before the next scheduled meeting of the state committee, he may direct the county executive committee in each county involved to conduct the recount and to report the result to the state committee; and if the application is for a recount in a first primary election, which recount might affect a runoff election in the second primary, in the stated circumstances the state chairman shall direct the county committee in each county involved to proceed immediately with the recount.

(b) In addition to other requirements stated in this section, each application must show the name and address

of each opposing candidate, and the name and address of the presiding judge of each election precinct for which a recount is requested. On the same day that a candidate delivers or mails his application to the presiding officer of the canvassing board, he must deliver in person or mail by certified or registered mail, with return receipt requested, a copy of the application and any supporting papers to each opposing candidate at the election.

Subdivision 3. *Procedure where ground for recount is alleged error in counting or failing to count ballots.* A candidate requesting a recount under the second ground stated in Subdivision 1 of this section must attach to his application a supporting affidavit or affidavits showing that the conditions for requesting the recount are met. On the same day that he delivers or mails his application to the presiding officer of the canvassing board, he must deliver or mail a copy of the application, together with a copy of each supporting affidavit, executed as an original, to the Secretary of State with the request that the Secretary of State make the certification described in Subdivision 4 of this section. Any opposing candidate shall be entitled to file with the Secretary of State a controverting affidavit or affidavits in denial of statements made in the supporting papers filed by the candidate requesting the recount, within three days after the date on which the application was delivered in person or mailed to him.

Subdivision 4. *Action by Secretary of State on request for certification.* Not sooner than three days nor later than five days after receipt of a request for certification under Subdivision 3 of this section, the Secretary of State shall consider the request and take action thereon. If from uncontroverted statements in the supporting papers it clearly appears, on the basis of the statutes and court decisions of this state, that the election officers were in error in couning or failing to count certain ballots and that the error likely affected the outcome of the race, he shall so certify. If the facts alleged fail to show a clear case of error or raise an unresolved legal question as to whether an error was committed with respect to certain ballots, the Secretary of State shall so find, and he shall not undertake to make a ruling on disputed facts or unresolved legal questions. Within the time stated above, the Secretary of State shall certify his findings and conclusions to the candidate making the request, with a copy to the presiding officer of the canvassing board and to each opposing candidate.

Subdivision 5. *Deposit to cover costs of recount.* A candidate requesting a recount shall deposit with the presiding officer of the canvassing board either cash, a cashier's check, a certified check, or a surety bond of an authorized corporate surety, in the amount of ten dollars for each election precinct in which a recount is to be made pursuant to his request, or in the amount of fifty dollars, whichever amount is the greater. If the application is filed under the first ground stated in Subdivision 1 of this section, the deposit must accompany the application; if the application is filed under the second ground, the deposit must be made within three days after the date on which the Secretary of State certifies that error which likely affected the outcome of the race was committed in one or more of the election precincts. For the purpose of this section, absentee ballots counted by a special board of election officers constitute ballots for a separate election precinct.

Subdivision 6. *Right of opposing candidate to obtain full recount.* If a candidate is granted a partial recount under Subdivisions 3 and 4 of this section, any opposing candidate may obtain a recount of all ballots in all pre-

cincts by filing a request for a full recount with the chairman of the canvassing board within three days after the date on which the Secretary of State makes his certification, and by accompanying the request with either cash, a cashier's check, a certified check, or a surety bond of an authorized corporation surety, in the amount of ten dollars for each additional election precinct for which a recount will be made as a result of his request. On the same day that he delivers or mails his request, the opposing candidate must deliver in person or mail by registered or certified mail, with return receipt requested, a copy of the request to the original applicant. Within two days thereafter, the original applicant must make a similar deposit covering additional precincts to be recounted.

Subdivision 7. *Procedure for ordering recount.* (a) Where a candidate has complied with all conditions for obtaining a recount, as soon as practicable the canvassing board conducting the recount shall set a date on which the recount is to begin and shall notify by mail each opposing candidate of the place or places where the recount will be conducted and the exact time when it will begin. The time for commencing the recount shall not be sooner than two days nor later than four days after the date of the notification. The recount shall be conducted in the office of the officer having custody of the voted ballots, who shall be entitled to be present or to have a representative designated by him present while the recount is in progress.

(b) The canvassing board shall appoint a committee of three disinterested registered voters of the political subdivision in which the ballots were cast, who shall make the recount. The board shall designate one member of the recount committee to serve as its chairman. Where ballots to be recounted are in the custody of different officers at

more than one location, a committee shall be appointed for each location. No person who served as an election judge, clerk, or watcher in any precinct for which ballots are to be recounted shall be eligible for appointment to a recount committee. The committee shall permit any affected candidate or one person authorized in writing by such candidate to be present to watch the recount, to inspect the ballots, to observe the tallying of the votes, and to observe all other actions of the committee in connection with the recount.

Subdivision 8. *Procedure for making the recount.* (a) The canvassing board shall issue an order to the officer having custody of the voted ballots, stating the names of the recount committee and the time at which the recount is to begin, and directing him to deliver to the chairman of the committee the ballot box or boxes containing the ballots to be recounted. A similar order for delivery of the keys to the ballot boxes shall be issued to the officer having custody of the keys. A copy of each order shall be delivered to the chairman of the committee, who shall present it, as proof of his identity, to the officer named in the order.

(b) The committee shall proceed to make the recount as directed, working for at least seven hours each day on every day that is not a Sunday or a legal holiday until the recount is completed. During the time that the recount is not actually in progress, the ballot boxes shall be relocked and returned to the custody of the officer who delivered them to the committee, and the keys shall be retained in the custody of the chairman of the committee.

(c) After the recount is completed, the committee shall make out its report and deliver it to the presiding officer of the canvassing board. The chairman of the committee shall deliver the locked ballot boxes with the original contents intact and the ballot box keys to the respective officers who originally had custody of the boxes and the keys.

SUBDIVISION 9. *Action by canvassing board following recount.* As soon as practicable, and not later than two days after receiving all the committee reports, the presiding officer of the canvassing board shall convene the board, which at such meeting shall declare the results of the election for the office involved on the basis of the revised returns. The board and its presiding officer shall take such further actions as may be necessary in the same manner as for an original canvass.

SUBDIVISION 10. *Costs of recount.* (a) The members of the recount committee shall be paid an amount to be fixed by the canvassing board, but not to exceed the maximum hourly rate payable to election judges and clerks, which shall be charged as costs. Expenses incurred by the canvassing board or its chairman in giving the notices required by this section shall also be charged as costs.

(b) If the recount shows that the applicant received a greater number of votes than shown by the returns of the election judges, and if as a result of the recount the applicant is declared to have been nominated or elected to the office, or to have become entitled to be a candidate in a runoff election, or to have tied with another candidate between the two of whom the right of nomination, election, or a place on a runoff ballot is to be decided, the cost of the recount shall be paid by the authority charged with the duty of paying the expenses of the election for which the recount was made, the amount deposited by the applicant shall be returned to him; provided, however, that if the original application was for a partial recount and the results of the election would have been changed in either of the foregoing manners on the basis of the partial recount only, the costs of the recount in additional precincts as the result of a request by an opposing candidate for a full recount shall be borne by the opposing candidate making

the request. Otherwise, the cost of the recount shall be paid by the applicant, and any amount remaining from the deposit shall be returned to him. Any costs over the amount of the deposit shall be paid by the applicant if he is charged with the cost of the recount; and any costs of a recount in additional precincts over the amount of the deposit made by the opposing candidate requesting the full recount shall be paid by such candidate if he is charged with the costs in those precincts.

SUBDIVISION 11. *Application for a full recount following a partial recount.* (a) Whenever there has been only a partial recount in which less than fifty percent of the total votes cast for the office, as shown by the original returns, were recounted, and as a result of the partial recount the number of votes received by any candidate is changed in such a manner that he would be entitled to request a recount under the first ground stated in Subdivision 1 of this section, but he had not been entitled to a recount on that ground on the basis of the original returns, he may obtain a recount in all additional precincts by following the procedure outlined in this subdivision.

(b) Whenever there has been a partial recount of more than fifty percent but less than seventy-five percent of the total votes cast, any candidate may obtain a recount in all additional precincts if he was not entitled to a recount on the first ground on the basis of the original returns, but as a result of the recount the difference in the number of votes received by him and the next highest candidate above him is less than two percent of the number of votes received by such next highest candidate, as shown by the revised returns, and he would gain the election or nomination or a place on a runoff election ballot if the full recount showed him to have received a greater number of votes than that opponent.

(c) An application under this subdivision for a recount in all additional precincts shall be made in the same manner and shall be treated in all other respects as an original application for a full recount, except that it covers only the additional precincts. The application may be made at any time after every recount committee involved in the partial recount has made its report, and must be filed not later than the second day after the canvassing board declares the result of the election on the basis of the revised returns following the partial recount. If as a result of the recount in the additional precincts the applicant therefor is declared to have been nominated or elected to the office, or to have become entitled to be a candidate in a runoff election, or to have tied with another candidate between the two of whom the right of nomination, election, or a place on a runoff ballot is to be decided, the cost of the recount in the additional precincts shall be paid by the authority charged with the duty of paying the expenses of the election, and the amount deposited by the applicant shall be returned to him. Otherwise, the cost of the recount in the additional precincts shall be paid by the applicant therefor, and any amount remaining from the deposit shall be returned to him. Any costs for the recount in the additional precincts over the amount of the deposit shall be paid by the applicant therefor if he is charged with the cost of the recount.

SUBDIVISION 12. *Effect of recount on an election contest.* Nothing in this section shall be deemed to prevent the filing of an election contest in a district court or to prevent the ordering of a recount in an election contest or to compel the court hearing the election contest to accept a recount under this section as conclusive of the results of the election.

Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 166a, added by Acts 1967, 60th Leg., p. 1903, ch. 723, § 37, eff. Aug. 28, 1967. Subd. 10(a) amended by Acts 1969, 61st Leg., p. 2662, ch. 878, § 2, eff. Sept. 1, 1969.

APPENDIX D

Congress of the United States

House of Representatives

COMMITTEE ON HOUSE ADMINISTRATION
SUITE H-326, U.S. CAPITOL
Washington, D.C. 20515

C-342360

December 3, 1976

Paul Eckstein, Esq.
222 N. Central
Phoenix, Arizona 85004

Dear Mr. Eckstein:

Pursuant to your inquiry this date regarding certain activities of the Committee on House Administration under the Contested Elections Act (2 USC 381, et seq.), please find the following:

1. Since the enactment of the Contested Elections Act the Committee has taken no action to enjoin, terminate or otherwise interfere with litigation in state courts pertaining to Congressional elections.

2. The Committee has sent staff counsel to monitor recounts and/or state court actions in four 1976 Congressional elections.

3. I am presently advised that Congressional elections are being contested, or will be contested, in state courts in Illinois, Texas, Louisiana, Michigan and California.

I trust this information is responsive.

Very truly yours,

/s/ Robert E. Moss

Robert E. Moss
General Counsel

The foregoing instrument is a full, true and correct copy of the original on file in this office.

Attest Dec. 29, 1976 WILSON D. PALMER, Clerk of the Superior Court of the State of Arizona, in and for the County of Maricopa.

By D. Patterson, Deputy

/s/ D. Patterson

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1408

RON PAUL, *Petitioner,*

v.

RORERT ALTON GAMMAGE, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Texas

---

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT ALTON GAMMAGE
515 Cannon House Office Bldg.
Washington, D.C. 20515

JOHN DANIEL REAVES
2853 Ontario Road, N.W.
Washington, D.C.

Attorneys for Respondent

May 13, 1977

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BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

The petition should be dismissed for lack of jurisdiction because the decision of the Supreme Court of Texas is supported by an independent and adequate non-federal ground. See discussion *infra,* at pp. 3-5.

STATEMENT OF THE CASE

Respondent, Gammage, won the general election on November 2, 1976 for congressman from the 22nd District of Texas in an admittedly close race. Peti-

tioner, Paul, the challenger, thereafter instituted three separate efforts to unseat Gammage. First, petitioner requested and obtained a full recount of all of the votes pursuant to the recount provisions of the Texas Election Code, Art. 7.14, Sec. 19 (for voting machines); Art. 7.15 Subd. 23 (for electronic voting systems); and Art. 9.38a (for paper ballots). Petition, pp. 33a-39a, 43a-52a. The recount was conducted under the general observation of inspectors from the Secretary of State of Texas (the chief election officer of the state) [1] and bi-partisan counsel from the Privileges and Elections Subcommittee of the House Administration Committee. The result was that respondent was confirmed as the winner of the election by a margin of 268 votes and on November 22, 1976 respondent was issued a certificate of election from the Secretary of State. Respondent was duly sworn in as a member of the 95th Congress on January 4, 1977.

Second, petitioner instituted an election contest suit in the state district court of Harris County, Texas pursuant to Art. 9.01 *et seq.* of the Texas Election Code. Petition, pp. 39a-43a. This statute vests original and exclusive jurisdiction in the district court to decide election contests, establishes procedures therefor and directs that the court "after a full and fair investigation of the evidence shall decide to which of the contesting parties the office belongs." Texas Election Code, Art. 9.14. Respondent sought and obtained mandatory injunctive relief against petitioner and the state district court proceeding with such suit, and it is from the judgment of the Texas Supreme Court that petitioner seeks review in this Court.

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[1] Texas Election Code, Art. 1.03.

Third, shortly after filing his election contest suit in the Texas state court, petitioner filed his "Notice of Contest" with the U.S. House of Representatives pursuant to the Federal Contested Elections Act, 2 U.S.C. §§ 381-396 (1970). On January 19, 1977 respondent filed his answer to such Notice of Contest, moving to dismiss. On February 8, 1977, the House Administration Committee referred petitioner's contest to a three member Ad-Hoc Panel on Contested Elections which conducted a hearing on February 23, 1977. On March 9, 1977 a majority of the Ad-Hoc Panel voted to recommend dismissal of petitioner's contest. Thereafter, on April 28, 1977, the full Committee reported favorably a resolution to dismiss petitioner's contest. The report of the Committee issued May 4, 1977, Report No. 95-243, 95th Cong., 1st Sess., reviews the case and recommends that petitioner's contest be dismissed on the merits.

On May 9, 1977 the matter came before the House of Representatives which, after full debate, adopted the Resolution dismissing petitioner's election contest. See Respondent's Appendix, pp. 1a-14a.

ARGUMENT

I. The Petition Should Be Dismissed for Lack of Jurisdiction

Petitioner invokes the certiorari jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). Respondent submits that review of this case pursuant thereto would be improper because the decision of the Supreme Court of Texas, of which review is sought, rests upon an independent and adequate non-federal ground. *Murdock* v. *Memphis,* 20 Wall. 590, 636 (1875); *Berea College* v. *Kentucky,* 211 U.S. 45, 53 (1908); *Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935); *Herb* v. *Pitcairn,* 324 U.S. 117, 125-6 (1945).

In the Supreme Court of Texas, respondent sought mandatory injunctive relief against the conduct of an election contest suit filed by petitioner under Art. 9.01 of the Texas Election Code. Respondent, the Democratic nominee for Representative from the 22nd Congressional District of Texas, had been the apparent winner at the general election held on November 2, 1976. Petitioner, the Republican nominee, requested a recount as permitted by the Texas Election Code, Art. 7.14, Sec. 19 (for voting machines), Art. 7.15, Subd. 23 (for punch-card ballots), and Art. 9.38a (for paper ballots). Upon conclusion of the recount, respondent was determined to be the winner by 268 votes and on November 22, 1976 was issued a certificate of election by the Secretary of State of Texas.

Dissatisfied with the results of the recount, petitioner instituted an election contest suit under the provisions of Art. 9.01 of the Texas Election Code. Petitioner sought a "judgment" invalidating the certificate of election and "declaring Contestant to be duly elected Congressman from such District for the next term . . . ." See Respondent's Appendix, p. 15a. Although petitioner shortly thereafter filed a contest with the House of Representatives pursuant to the Federal Contested Elections Act, 2 U.S.C. §§ 381-396 (1970), he declined to avail himself of the discovery procedures provided therein. Instead, petitioner instituted extensive discovery pursuant to state procedure as part of his election contest suit in state district court, including an attempt to depose respondent after he was sworn in as Congressman. Respondent thus sought mandamus against the district court and petitioner proceeding with the state court suit.

The Supreme Court of Texas framed the question presented: "The principal question is whether the District Court has jurisdiction over the contest under Art. 9.01 of the Texas Election Code." (Petition, p. 2a) After reviewing the language of the statute, its legislative history, decisions of this Court, and other state courts, the Supreme Court of Texas concluded:

> "We hold that Art. 9.01 of the Texas Election Code *is inapplicable* to contests of elections of Members of Congress, and any attempt to apply it to congressional elections would be in violation of Article I, § 5 of the Constitution of the United States." (Petition, p. 9a.) (emphasis supplied).

The Supreme Court of Texas obviously and correctly believed that *if* the Texas statute were construed to be applicable to congressional elections, as petitioner had contended, the statute would be contrary to Art. I, § 5 of the U. S. Constitution. It is nevertheless clear that the court was of the view, and held, as a matter of *state* law, that Art. 9.01 did not authorize a suit such as the one petitioner sought to maintain against respondent. There is an adequate and independent state ground to support the lower court's judgment, which is not reviewable by this Court pursuant to its certiorari jurisdiction. Therefore, the petition for certiorari should be dismissed for lack of jurisdiction.

II. The Petition Should Be Dismissed for Mootness

As noted above, on May 9, 1977, the House of Representatives passed a Resolution dismissing petitioner's contest filed under the Federal Contested Elections Act, 2 U.S.C. §§ 381-396 (1970). The House has therefore exercised its power under Article I, § 5 of the Constitution consistent with the statutory provisions there-

for in the Contested Elections Act, and hence there is nothing for this Court to review. In *Roudebush* v. *Hartke,* 405 U.S. 15 (1972),[2] Senator Hartke had been seated by the Senate "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to the outcome of any recount that the Supreme Court might order." 405 U.S. at 18. Hartke's argument that the case was moot was found insufficient in the face of the Senate's reservation. The Court held that the narrow question before it—"whether an Indiana recount of the votes in the 1970 election is a valid exercise of the State's power under Art. 1, § 4 to prescribe the times, places, and manner of holding elections, or is a forbidden infringement upon the Senate's power under Art. I, § 5"—was appropriate for Supreme Court consideration in view of the Senate's qualified seating of Hartke. The Supreme Court said:

> "That question is not moot, because the Senate has postponed making a final determination of who is entitled to the office of Senator, pending the outcome of this lawsuit. Once this case is resolved and the Senate is assured that it has received the final Indiana tally, the Senate will be free to make an unconditional and final judgment under Art. I § 5. Until that judgment is made, this controversy remains alive, and we are obliged to consider it."[3] (405 U.S. at 19).

[2] The Federal Contested Elections Act applies only to contests filed with the House of Representatives. The Act was, therefore, not involved in the *Roudebush* case, which was a Senate contest.

[3] Since "the judgment" in petitioner's contest has been made by the House of Representatives, petitioner's attempt, in footnote 5 of the Petition, to avoid mootness is without merit.

Here, the House has denied petitioner's request for postponement, has received the final Texas tally and has fully considered the contest filed by petitioner challenging respondent's election under the procedures established by the Contested Elections Act. The Committee's Report states:

> "In conclusion, therefore, this decision is not based on any technical or procedural defect but on solid substantive defect pursuant to controlling law and consistent with the cases and House precedent." See U.S. House of Representatives, Committee on House Administration, 95th Cong., 1st Sess. Report No. 95-243 (May 4, 1977) at 5.

The House Administration Committee thus reported favorably the resolution of dismissal (H. Res. 526) of petitioner's contest, *on the merits.* After debate, the full House adopted such Resolution dismissing petitioner's contest. The House has thus exercised its constitutional prerogative under Art. I, § 5 and the case is now moot. See Respondent's Appendix A, pp. 1a-14a.

III. The Decision of the Supreme Court of Texas Is Not in Conflict with Roudebush v. Hartke

Should this Court conclude that a reviewable federal question is before it pursuant to its certiorari jurisdiction, 28 U.S.C. § 1257(3), respondent submits that the Supreme Court of Texas was clearly correct in its analysis of the Texas statute in light of this Court's decision in *Roudebush* v. *Hartke*. *Roudebush* involved Indiana's "recount" statute which is substantially similar to the Texas recount provisions which are not in issue here. Petitioner sought and obtained a full recount under Texas law which confirmed respondent as the winner. The recount statute in Indiana provided

for a judge, upon receipt of a petition, to appoint three commissioners to conduct the recount. Once these appointments are made, the Indiana court has no other responsibilities or powers. This is similar to the procedure followed in a Texas recount pursuant to Arts. 7.14, § 19, 7.15, Subd. 23, and 9.38a of the Texas Election Code, but quite different from those provided by Art. 9.01 *et seq.* for an election contest suit which petitioner filed below.

Contrary to the situation in Indiana, of which the Supreme Court said, "the exercise of these limited responsibilities does not constitute a court proceeding," 405 U.S. at 21, Art. 9.01 of the Texas Election Code provides:

> "The District Court shall have original and *exclusive* jurisdiction of all contests of elections, general or special, for all school, municipal, precinct, county, district, state offices, or federal offices, except elections for the offices of Governor, Lieutenant Governor, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, Attorney General, and Members of the Legislature." (Petition, pp. 39a-40a.)

Art. 9.08 says that in such contest the evidence will be confined to issues made by the pleadings and that "as to the admission and exclusion of evidence, the trial shall be conducted under the rules governing proceedings in civil causes." The contestee in such proceeding is required to execute a bond equal to double the amount of the anticipated salaries from the office over the next two years. Failure to file such bond gives the contestant the right to file the bond and take the office regardless of the vote in the election or the state's certificate of election. Arts. 9.09-9.13. Finally, Art.

9.14 provides that "after a full and fair investigation of the evidence [the court] *shall* decide *to which of the contesting parties the office belongs.*" In his pleadings instituting the contest suit, petitioner sought the relief provided by Art. 9.01: "that . . . a judgment be entered setting aside [respondent's] certificate [of election] and declaring contestant to be duly elected Congressman from the [22nd] District for the next term." So, contrary to the "limited", non-judicial recount involved in *Roudebush,* petitioner sought relief of the kind and nature condemned by *Roudebush.*

In discussing the Indiana statute, the Court in *Roudebush* noted:

> "A recount is an integral part of the electoral process and is within the ambit of the broad powers delegated to the states by Article I, § 4. It is true that a State's verification of the accuracy of election results pursuant to its Art. I, § 4, powers is not totally separable from the Senate's power to judge elections and returns. But a recount can be said to 'usurp' the Senate's function only if it frustrates the Senate's ability to make an independent final judgment. A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conduct its own recount." 405 U.S. at 25-26.

Texas has a similar recount procedure which petitioner invoked and pursuant to which respondent was confirmed to be the winner. However, the Texas procedure provided by Art. 9.01 *et seq.*, upon which petitioner's state court suit was based, if applied to congressional elections, would clearly purport to "usurp" the House's

powers since the state court is given "*exclusive* jurisdiction" and "*shall* decide to which of the contesting parties the office *belongs.*" This is plainly far different from the non-judicial recount involved in *Roudebush* v. *Hartke* and would on its face, and pursuant to petitioner's pleadings, "frustrate" the House's "ability to make an independent final judgment."

As we said earlier, the Supreme Court of Texas was quite correct in regarding this unprecedented and clearly unconstitutional power as not within the scope of the Texas statute as a matter of state law. The Court was further correct in its alternative conclusion that if such statute were applied to a congressional election contest, such as the one here, it would be plainly unconstitutional.

IV. The Decision Below that the Texas Election Contest Statute Is Inapplicable to Federal Congressional Elections Is Consistent with the Rulings of Other Federal and State Courts.

As stated previously, the Texas election contest statute, as interpreted by the Supreme Court of Texas (see Petition at 7a-8a & n.6, 9a), vests exclusive jurisdiction in the Texas state court to "decide to which of the contesting parties the office belongs." (Petition at 7a-8a & n.6) The Texas Supreme Court construed the statute as inapplicable to congressional elections, concluding that the determination of which candidate is to be seated in the House or Senate is not the business of the courts of Texas. Thus, the decision is on all fours consistent with the Supreme Court's statement in *Roudebush* v. *Hartke*, 405 U.S. 15 (1972). Said the Court in *Roudebush*: "Which candidate is entitled to

be seated in the Senate is, to be sure, a nonjusticiable political question—a question that would not have been the business of this Court even before the Senate acted." *Id.* at 19 (footnote omitted). See *Powell* v. *McCormack*, 395 U.S. 486 (1969).

Furthermore the decision below that a state court may not determine which candidate is entitled to be seated in the House is consistent with a long line of federal and state decisions. See *Manion* v. *Holzman*, 379 F.2d 843, 845 (7th Cir. 1967); *Rogers* v. *Barnes*, 172 Colo. 550, 474 P.2d 610 (1970); *Burchell* v. *State Board of Election Commissioners*, 252 Ky. 823, 68 S.W.2d 427 (1934); *Belknap* v. *Board of Canvassers of Ionia County*, 94 Mich. 516, 54 N.W. 376 (1893); *McLeod* v. *Kelly*, 304 Mich. 120, 7 N.W. 2d 240 (1942); In re *Williams'* Contest, 198 Minn. 516, 270 N.W. 586 (1936); *Odegard* v. *Olson*, 264 Minn. 439, 119 N.W. 2d 717 (1963); *Laxalt* v. *Cannon*, 80 Nev. 588, 397 P.2d 466 (1964); *Smith* v. *Polk*, 135 Ohio St. 70, 19 N.E.2d 281 (1939).

It should be noted that *Durkin* v. *Snow*, 403 F.Supp. 18 (D.N.H. 1974), did not, as asserted by petitioner, hold that *Roudebush* permitted state court election contests. The district court upheld a New Hampshire statute which permitted the State Ballot Law Commission to review all rulings of the state Secretary of State on ballots protested "during the recount." The district court stated, "We are satisfied that the statutory proceedings in progress before the Commission, *like the Indiana recount in Roudebush*, are an integral part of the New Hampshire electorial process and are 'within the ambit of the broad powers delegated to the

states by Art. I, Sec. 4.' " *Id.* at 19 (footnote omitted) (emphasis supplied).[4] *Lacaze* v. *Johnson,* 302 So. 2d 613 (La. 1974), cited also by petitioner, is a three-sentence opinion of the Louisiana Supreme Court involving the application of Louisiana's election returns statute, § 18-1193, La. Rev. Stat. (1969). Louisiana's election contest statute, § 18-1251, La. Rev. Stat. (1969), which by its terms does not apply to election contests for congressional elections, was not dealt with in the Louisiana Supreme Court's opinion.

V. The Decision Below Does Not Improperly Constrict the Ability of the States To Protect Voting Rights in Federal Elections

The decision by the Texas Supreme Court represents no incursion upon the rights ascribed to the states to set the times, places and manner of holding elections for United States Senators and Representatives under Article 1, Section 4, of the constitution. The Texas Supreme Court has ruled only that if Article 9.01 is applied to congressional elections, the statute would vest a local court with exclusive jurisdiction to determine which candidate is entitled to be seated in the Congress. Thus the decision below, limited as it is, hardly constitutes the "serious incursion into state

[4] The district court determined also that an injunction against state court proceedings would be an unwarranted exercise of its discretion. The court said: "Whether the New Hampshire courts would exceed their constitutional authority were they to order a new election or to order other types of action are, at this time, purely hypothetical questions which cannot be decided apart from consideration of specific orders . . . . The door of the federal court remains open should it be demonstrated that state actions or practices are being pursued which deprived the Senate or any candidate of rights under the federal Constitution." *Id.* at 20.

power, to protect voting rights," as contended by petitioner.

More specifically, the decision does not preclude, as asserted by petitioner, state review of fraud or misconduct. Left standing in "the wake" of the decision below are some 300 pages of Texas election statutes. See J. Patterson, Jr., *Texas Election Laws* (1976-1977 ed.). These laws, for example, authorize the Attorney General of Texas as well as local district and county attorneys to investigate the conduct in any election—primary, general or special—held for any national or state office. These state officials are empowered to investigate the making, canvassing and reporting of the returns. Additionally, the Attorney General and the district and county attorneys are authorized to appear before grand juries and to prosecute *any* violation of the election laws of Texas. The authority of the Attorney General, the local attorneys, and the grand jury is over "any candidate, election official or other person." See Article 9.02, Texas Election Code.

Moreover, petitioner would have the Court believe that the effect of the decision below is to shackle the functioning of a vast array of state statutes providing for contests in congressional elections.[5] Petitioner

[5] "In Texas and elsewhere, the effect of the decision below would be immediate and grave. There would be no state review of fraud or misconduct, regardless of how serious or obvious. State participation in the verification of the election results would be limited to inspection of the ballots themselves. In the entire election process there would be no state review of the acts of local officials, and even obvious and deliberate error could not change the official state declaration of its election results. Until this issue is resolved, candidates will be reluctant to pursue state remedies the sole result of which may be delay, expense, and even forfeiture." Petition at P. 14 (footnotes omitted).

elsewhere in his Petition, however, points only to six states which he contends have contest statutes which are expressly applicable to congressional elections. While petitioner contends that these six contest statutes expressly apply to general elections for congressional seats, closer scrutiny reveals that one of these applies only to the primary election and two are, in essence, recount provisions.[6]

---

[6] Connecticut provides that any elector or defeated candidate who is "aggrieved by any ruling of the moderator at any election . . . for representative in congress" or who claims "that there was a mistake in the count of the votes cast at such election" may petition the court for a hearing. Indicative of the limited nature of the Connecticut proceeding is the fact that the court must certify its determination to the state secretary "before the 1st Monday after the 2nd Wednesday in December." See Conn. Gen. Stat. Annot. Sec. 9-323.

The Minnesota statute is also a recount provision. Its statute specifies that when the contest relates to federal legislative offices, "the only question to be tried by the court, notwithstanding any other provision of law, shall be the question as to which of the parties to the contest receive the highest number of votes legally cast at the election, and as to whom is entitled to receive the certificate of election." Minn. Stat. Annot. Sec. 209.02 (1976). The Minnesota statute permits the judge to receive evidence related to deliberate, serious and material violations of Minnesota election law but the statute directs that the judge shall make no findings or conclusion thereon but, instead, shall without unnecessary delay, forward all the files and records of the proceedings with all the evidence taken to the presiding officer of the United States Senate or the House of Representatives, as the case may be. See Minn. Stat. Annot. Sec. 209.02 (1976).

Georgia provides for a contest in primary elections; in general elections for federal offices, the statute provides for contests, "except where otherwise prescribed by the Federal or State Constitution". Ga. Code Annot. Sec. 34-1702 (1970).

Pennsylvania's contest statute applies only to "nominations [at primaries]" for congressional offices. By contrast it allows

Petitioner, however, also lists 12 other states as having contests statutes "which apparently" encompass congressional elections. If so, their use must be rare indeed as no decisions are cited which suggest trast, however, to petitioner's claim of 12 states, the that they have been utilized significantly.[7] In con- 1975 *Harvard Law Review* study, cited by petitioner, lists not one state as having a contest statute applicable to congressional elections. See *Developments in the Law—Elections,* 88 Harv. Law Rev. 114, 1302-1304, nn. 22, 23, 24 & 25. Indeed the *Review* states,

> "Forty-six states and the District of Columbia have enacted statutes providing for contests of some elections. Generally all primary contests are heard by courts, as are general election contests for county and local offices. Contests of the elections of state and federal legislators are decided by the legislatures or United States Congress, and contests of elections of state executive officers are conducted with almost equal frequency in courts and state legislatures." See *Id.* at 1302-1305.

The claim of an undue burden on Congress is unsubstantiated and inaccurate. Petitioner contends that the effect of the decision below is to place an insuperable burden upon the House of Representatives

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for contest of both nominations and elections of state senators and representatives. See Pa. State. Annot. Sec. 25-3291 (1963).

Thus, of the six states cited as having contest statutes applicable to general elections for congressional seats, only two have such procedures; if Georgia, with its ambiguously worded statute, is included, the total is three out of 50 states.

[7] Indeed, as the decision below points out (Petition at 6a), there was no reported decision of any prior use of the Texas procedure where a party sought to contest an election for a House or Senate seat.

investigative capacity "which is primarily a legislative body and is ill equipped to undertake a judicial workload of such magnitude." Respondent must ask: What evidence is there of such an insuperable burden. The Library of Congress reports only 78 contest filings in the House of Representatives during a period of 43 years. See Library of Congress, Congressional Research Service, *House Contested Election Cases: March 1933 to 1975* (June 1976). The largest number of contests listed for any congressional session is 17—in the 73rd Congress (March 9, 1933 to June 18, 1934). There were no contests filed, at all, in either the 83rd, 84th or the 93rd congressional sessions and only one contest in the 77th, 79th, 88th and 91st Congresses. Turning to recent congressional sessions, two contests were filed in the 90th Congress, one contest in the 91st, two contests in the 92nd, no contests in the 93rd, five contests in the 94th, see *id.* (table of cases by Congresses), and, as stated previously, there are seven contests in the 95th Congress.

In a word, evidence that the decision below will have a significant impact on the workload of the Congress is considerably underwhelming.

The Federal Contested Elections Act, 2 U.S.C. §§ 381-396 provides an efficient, comprehensive, and equitable procedure for contesting the election of a member of the House of Representatives.[8] It affords the contestant the right to take testimony within 30

[8] Although perhaps not relevant for purposes of this brief, respondent is of the view, as we argued to the court below, that the Federal Contested Elections Act preempts any otherwise applicable state election contest statute and affords the exclusive remedy for a disappointed candidate who wishes to challenge the election results certified by a state.

days after the contestee's answer has been filed, see 2 U.S.C. § 286(c); the Act affords a contestant access to both federal and state courts to obtain subpoenas and provides that the subpoena may also command the production of books, papers, documents or other tangible things, see 2 U.S.C. § 388(a) & (e). Moreover, the Act provides the contestant with a hearing before the Committee on House Administration on the papers, depositions and exhibits that he has filed with the clerk. The Act allocates the decision-making to the United States Congress, where it belongs, but provides for the utilization of local courts in the evidence-gathering process. Respondent submits that the Act represents an appropriate allocation between federal and state governments and accords with the standard set forth in the Constitution that "each House shall be the judge of the elections, returns and qualifications of its own members." Art. 1, § 5, U.S. Const.

CONCLUSION

Wherefore, respondent respectfully prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

ROBERT ALTON GAMMAGE
JOHN DANIEL REAVES
Attorneys for Respondent

APPENDIX

INDEX TO APPENDICES

APPENDIX A

CONGRESSIONAL RECORD—HOUSE, pp. H4184-H4187 (MAY 9, 1977)

Dismissing the Election Contest Against Bob Gammage

Mr. THOMPSON. Mr. Speaker, by direction of the Committee on House Administration, I call up a privileged resolution (H. Res. 526) and ask for its immediate consideration.

The Clerk read the resolution as follows:

H. RES. 526

RESOLVED, That the election contest of Ron Paul, contestant, against Bob Gammage, contestee, Twenty-second Congressional District of the State of Texas, be dismissed.

The SPEAKER pro tempore. The gentleman from New Jersey (Mr. THOMPSON) is recognized for 1 hour.

Mr. THOMPSON. Mr. Speaker, this resolution deals with the contested election case of Paul against Gammage. The ad hoc committee investigating this case was chaired by the gentleman from Pennsylvania (Mr. AMMERMAN) and consisted of the gentleman from Michigan (Mr. NEDZI) and the gentleman from California (Mr. WIGGINS).

Mr. THOMPSON. Mr. Speaker, I yield such time as he may consume, for debate only, to the gentleman from Pennsylvania (Mr. AMMERMAN), the panel chairman.

(Mr. AMMERMAN asked and was given permission to revise and extend his remarks.)

Mr. AMMERMAN. Mr. Speaker, the subject of House Resolution 526, for which I now rise, is the contested election case of Paul against GAMMAGE arising out of the general election of November 2, 1976, for a seat in the 59th Congress from the 22d district of Texas. I will briefly sum-

marize events which have taken place from the date of the general election, November 2, 1976, up to this moment.

The result of the November 2, 1976, general election involving Mr. GAMMAGE and Mr. Paul showed a difference of 236 votes in Mr. GAMMAGE's favor.

Mr. Paul requested and obtained a full recount pursuant to Texas law which resulted in a difference of 268 votes in Mr. GAMMAGE's favor.

The recount was conducted under the general observation of inspectors from the secretary of state of Texas and by counsel from the House Administration Committee. Accordingly, on November 22, 1976, BOB GAMMAGE received a certificate of election from the secretary of state of Texas. Mr. GAMMAGE was duly sworn, without objection, as a member of the 95th Congress on January 4, 1977.

Mr. Paul filed an election contest in the State district court of Harris County, Tex., pursuant to Texas law. Mr. GAMMAGE responded with a motion to dismiss and State court litigation was joined.

On December 19, 1976, contestant Paul filed a notice of contest with the U.S. House of Representatives pursuant to the Federal Contested Election Act. The matter was referred to the Committee on House Administration and on January 19, 1977, contestee GAMMAGE filed an answer and motion to dismiss.

During this period, Chairman FRANK THOMPSON, Jr., appointed me to chair a contested election panel to deal with this matter. Also serving on that panel are LUCIEN NEDZI and CHARLES WIGGINS.

On February 23, 1977, the panel conducted an open hearing for the purpose of hearing oral arguments from both sides pertaining to three motions:

First. A motion by contestant Paul requesting that the House stay all proceedings pending the outcome of court proceedings in Texas.

Second. A motion by contestant Paul requesting 30 additional days for taking depositions.

Third. A motion by contestee GAMMAGE for a dismissal of the case. Arguments were heard and taken under advisement. The record was held open for postsubmission briefs.

One week after the panel hearing, on March 2, 1977, the Supreme Court of Texas ruled that the provisions of Texas law under which contestant Paul had brought his State court contest, as it applied to Federal offices "is in diametrical conflict with and contrary to article I, section 5 of the U.S. Constitution."

The State court cases were thereby terminated and the question of staying House proceedings was moot.

On March 9, 1977, again 1 week later, the panel met in an open hearing for the purpose of discussing the evidence presented. Pursuant to a motion made by Chairman AMMERMAN, the panel voted 2 to 1 to recommend to the full Committee on House Administration that contestee GAMMAGE's motion to dismiss be granted.

On April 28, 1977, at a full committee meeting, the Committee on House Administration voted 16 to 6 to adopt House Resolution 526:

> *Resolved,* That the election contest on Ron Paul, contestant, against BOB GAMMAGE, contestee, 22d Congressional District of the State of Texas, be dismissed.

That is the resolution before the House this afternoon.

Mr. Speaker, a contest for a seat in the House is a matter of the most serious import. The House underlined its concern when it passed, in 1969, the Contested Election Act.

The thrust of the legislative history and first House cases interpreting the contested election law can be summarized simply:

> The contestant must, at the outset make allegations with sufficient supportive evidence to justify his claim

to the seat. In other words, Mr. Speaker, the contestant must come forward with sufficient evidence, which if substantiated, would show he would have won the election.

Mere allegations or statements by one's campaign workers do not meet the high standard of supportive evidence that must be offered before a contestant is entitled to go forward.

The dissenting views object because an evidentiary burden is placed on contestant Paul. However, Mr. Speaker and my fellow colleagues, that is only proper: The contested election law does not purport to allow losing candidates to go on fishing expeditions. Indeed, had the committee permitted, Mr. Paul might have attempted to depose every voter in the 22d district.

Mr. Speaker, Ron Paul had his "days in court." This committee allowed him ample opportunity to argue his case and present supportive and credible evidence that would show his entitlement to this seat in Congress.

He argued at length, but failed to present evidence to support his claim to this seat.

Mr. Speaker, I urge the adoption of House Resolution 526.

Mr. THOMPSON. Mr. Speaker, before yielding to the distinguished gentleman from California, I am constrained to say with considerable pride that in this instance and in the preceding one, the wisdom of setting up bipartisan panels, including bipartisan staff and bipartisan investigators, is vindicated by the splendid work done by the gentleman from Pennsylvania (Mr. AMMERMAN) and the gentleman from New Jersey (Mr. MINISH), as well as the two panel chairmen to follow. The gentleman from Pennsylvania (Mr. AMMERMAN) has been a U.S. attorney for western Pennsylvania, and has had extensive experience as a prose-

cutor, as a lawyer, and certainly has given evidence of a splendid knowledge of law in this instance.

Mr. Speaker, for purposes of debate only, I yield 5 minutes to the gentleman from California (Mr. WIGGINS), a distinguished constitutional lawyer second only to the gentleman from Texas (Mr. ECKHARDT).

Mr. WIGGINS. Mr. Speaker, I thank the gentleman for yielding to me. I object to the resolution, and will urge my colleagues to vote against it, but I assure the gentleman that my objections are not based upon any constitutional argument.

Ladies and gentlemen, we are in the process of adopting a totally improper procedure for the consideration of election contests, and it is important that we correct it now. It has nothing to do with the merits of Mr. Paul's case or the case that will follow. It is important, however, that whatever the merits may be, we adopt a procedure providing for the orderly, fair disposition of election contests.

Let me explain very briefly, ladies and gentlemen, what our statute provides. The new contested election statute enacted by this House provides that a contest will be commenced by the filing of a document known as a notice of contest. This is something akin to a complaint. It is a pleading which initiates the process.

That pleading, the notice of contest, must be filed within 30 days following the certification of the results of an election by the appropriate State election officers. In this case, there is no challenge at all to the fact that Mr. Paul filed an appropriate notice of contest within the time provided by law.

The next section of our election contest statute says what the contestee must do when served with a notice of contest. The statute says that the contestee may do one of two things: He may either filed an answer within 30 days of service of the notice of contest, in which answer the con-

testee admits, denies or otherwise answers the complaint; or, alternatively, the contestee may raise certain motions by way of defense.

Those motions include a statement that the complaint, that is, the notice, is so ambiguous that it is impossible to frame an answer to it. We understand such a motion. It is addressed to the sufficiency of the pleading. The statute also provides that a contestee may, by way of motion, complain that the notice of contest fails to state with particularity the grounds upon which the contest is founded or that it would change the result of the election. Such a motion is also addressed to the pleadings.

Bear in mind that the burden on the maker of that motion is to "state," only to allege, the basis of the contest.

The statute goes on to provide a method of collecting evidence in support of a well-pleaded notice of contest. The statute says that 30 days after this answer comes in, the contestant may start collecting his evidence by way of noticing depositions, obtaining affidavits, or entering into stipulations.

That is the technique envisioned in the law for the proof of allegations contained in a notice of contest.

That is the process, I say to the Members. Let me tell the Members what is wrong with our treatment of that process.

We are authorizing the contestee to file a motion to dismiss any time after the filing of the notice of contest. When that motion to dismiss is filed, the majority says that there is a burden cast upon the contestant. He is a respondent to the motion. The immediate burden is cast on the respondent of the motion to come forward and prove the case at that time, even though the time for taking depositions and the collection of evidence has not yet run.

There is an analogy in Federal civil practice.

It is clear that the maker of a motion to dismiss is asking for a disposition of the case on the merits. He is not challenging the pleadings. It is not in the nature of a demurrer.

In that respect, the motion to dismiss is very much like a motion for summary judgment.

There are enough attorneys in this Chamber right now to know that the maker of a motion for summary judgment carries a very heavy burden of proof.

The SPEAKER pro tempore. The time of the gentleman from California (Mr. WIGGINS) has expired.

Mr. THOMPSON. Mr. Speaker, I yield 5 additional minutes for the purpose of debate only to the gentleman from California (Mr. WIGGINS).

Mr. WIGGINS. Mr. Speaker, as I just said, this motion to dismiss is very much like a motion for summary judgment. When confronted with a motion for summary judgment in civil litigation, the responding party does not carry the burden, nor should he. The maker of the motion carries the burden. And he must show that there are no issues of fact justifying going to the jury, and he must show that he is entitled to judgment as a matter of law. The responding party need not prove his case to defeat the motion.

He must merely show credible questions of fact which justify going forward.

Mr. Speaker, we are now abandoning all those lessons, and we are saying that the making of motion to dismiss immediately after a notice of contest casts upon the respondent the duty of proving his case right then in response to the motion, even though the effect of granting the motion, as in this case, is to cut off the opportunity of taking depositions, which is the technique envisioned in the statute for collecting the evidence.

Let me suggest a proper disposition of this matter. Clearly this resolution ought to go back to the committee

so that the contestant can go forward with his attempt to prove his case, as envisioned by the statute. I have no idea whether he is going to prove it or not. He has undertaken a pretty tough case to prove, and it may be that he cannot prove it. But surely he should have the chance to do so, and he should not be cut off.

The proper disposition of the pending resolution is to recommit that resolution to the Committee on House Administration so that the contestant will have a chance to prove his case. If in fact he cannot do so, of course, we will dispose of his contest quickly, but under no circumstances should we right now on this floor ratify a procedure which denies to a contestant the opportunity of proving his case.

In conclusion, Mr. Speaker, it might be alleged that Mr. Paul had that chance. After all, the statute gives him 30 days within which to take depositions. But the statute also says that he may extend that time for good cause, and within 30 days Mr. Paul through his attorney came forward and made a formal request to extend time.

Our committee did not even reach that motion. It elected to dismiss it on the merits and with prejudice because the contestee filed a notice to dismiss.

We cannot tolerate this procedure. We cannot tolerate it in the future. There are going to be other contests by Republicans and Democrats, so let us not look at this as a partisan issue. This question will come up again in the future. If we do anything today, let us establish a precedent, a precedent that will provide for the fair disposition of all election contests according to the election contest statute. Let us not emasculate that statute as is suggested by the majority.

Mr. Speaker, I urge a "no" vote on the resolution. I urge an "ayes" vote on the motion to recommit which will be made.

[Mr. THOMPSON addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

Mr. Speaker, I yield 4 minutes to the gentleman from Michigan (Mr. NEDZI).

(Mr. NEDZI asked and was given permission to revise and extend his remarks.)

Mr. NEDZI. Mr. Speaker, I thank the gentleman from New Jersey (Mr. THOMPSON) for yielding me this time.

Mr. Speaker, I was very pleased to hear the gentleman from California (Mr. WIGGINS) say that this is not a partisan issue. I think the Members on our side have demonstrated that it is not a partisan issue because we voted across the board in all four of these contests. We disallowed them basically because evidence was not presented to our committee which warranted that kind of response upholding any of the contests.

Mr. Speaker, the issue is a pretty simple one which I think each of us is going to have to resolve in his own mind. The gentleman from California (Mr. WIGGINS) has taken one approach to the statute. I along with my colleagues on this side of the aisle, have taken another approach which I think is the more reasonable one.

The question is whether we are going to insist upon all of the fine legalisms of procedure that exist in a court of law in these election contests which are, as all of us know, fraught with political pitfalls and political temptations.

This is the problem, Mr. Speaker. It is not a partisan issue.

I think that in many cases if we go the route of allowing these legal procedures to tie up the Committee on House Administration and the House of Representatives to a point where we cannot resolve these election contests expeditiously, we are going to find that in each of the congressional districts anyone who thinks that he has a good

shot as whoever is pronounced the winner of an election, during the next election will engage in an election contest. He will come in and have a forum which will enable him to get a leg up as far as the next election is concerned. The issue will not be resolved within that period of time.

Therefore, Mr. Speaker, the question is whether we are going to seek to resolve these issues expeditiously where evidence has not been presented to the panel with any degree of sufficiency, or whether we are going to insist on permitting these people to go on fishing expeditions.

There is an historical presumption that the certificate of election is valid; and unless that is refuted with adequate evidence, we certainly should stick to that presumption.

Mr. MAHON. Mr. Speaker, will the gentleman yield?

Mr. NEDZI. I yield to the gentleman from Texas.

Mr. MAHON. Mr. Speaker, I concur in the remarks of the gentleman from Michigan (Mr. NEDZI). The Committee on House Administration has now investigated this matter and is satisfied that Mr. GAMMAGE received the majority of the votes in the election and that in the recount he continued to receive a majority of the votes. He was certified by the secretary of state of Texas as having been elected to the Congress from the 22d District. Any close election always raises questions, but it seems to me this now should not be a partisan matter and that the proper action of the House is to approve the recommendation of the Committee on House Administration so that the people of the 22d District of Texas can be represented.

I urge the House to defeat the motion to recommit and to approve the recommendation of the committee.

Mr. THOMPSON. Mr. Speaker, I yield 2 minutes to the gentleman from Texas (Mr. ARCHER), for purposes of debate only.

(Mr. ARCHER asked and was given permission to revise and extend his remarks.)

[Mr. ARCHER addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

Mr. THOMPSON. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I cannot leave unanswered the remarks of the gentleman from Texas (Mr. ARCHER). To say that there is still doubt may be a valid claim in his mind. It is not in the judgment of the committee.

To say that there has been a denial of justice by the Committee on House Administration is an absolute and complete untruth and is deeply resented.

I refuse to yield.

To say that we should yield this matter to the Supreme Court of Texas is to say to the Supreme Court of Texas, notwithstanding the 5-to-4 vote that, no, you are wrong, we throw it back to you.

To say that we have not considered motives, to say that we have been unfair, is an absolute insult to the members of the Committee on House Administration and I do not intend to let it go unanswered.

I deeply regret having to say this to the gentleman.

The gentleman from California (Mr. WIGGINS) has not accused us of evil motives. He bases his case on legal theory. The gentleman from Texas may make such judgments as he wants on the Americanism of anybody—whatever that is, whether it be love of mother, or apple pie, or Texas, or whatever. He can have his definition. I have wondered for years at the definition of a great American. I have heard a great many described as great Americans whom I would not describe as such, but I have not taken their definition.

Mr. Speaker, I yield briefly to the gentleman from Californit (Mr. WIGGINS) for the purpose of debate only.

Mr. WIGGINS. Mr. Speaker, I did not at all understand the gentleman from Texas (Mr. ARCHER) to impugn in any way the motives and the integrity of the members of the committee on which we both serve but, nevertheless, I fully share the views of the gentleman from Texas that justice has been denied in this case because the committee is approving a procedure which prevents one of the parties from going forward to prove his case. That is a fair observation and I hope the gentleman from New Jersey does not take it personally.

Mr. THOMPSON. Mr. Speaker, if the gentleman will yield, we have adhered strictly to the standards set forth in the statute. I concede to the gentleman that it can be bad but I deny that there was any justice denied in this case.

Mr. WIGGINS. Indeed, the words "motion to dismiss" do not appear anywhere in this statute. This is not a statutory motion. Rather it calls upon the inherent authority of the committee to dismiss a frivolous petition on a good showing. Strangely, we require the respondent to prove his case in order to resist the motion. That is not right, my colleagues, and I do not believe that that is what justice is all about. This emasculates the statute. I urge the Members to read it, it is all in title 2, section 382.

Mr. THOMPSON. Mr. Speaker, I yield 2 minutes, for debate only, to the gentleman from California (Mr. JOHN L. BURTON).

(Mr. JOHN L. BURTON asked and was given permission to revise and extend his remarks.)

MR. JOHN L. BURTON, Mr. Speaker, later on there is another contest Pierce against PURSELL, that is a very close election that will forever be in doubt in the minds of many people, including the member of the Democratic Party whose motion was dismissed by majority members of the House Administrative Committee he was denied any means of pursuing his action, which was merely a recount, because

there is no provision available. We did it consistent with the laws and the procedures of this House and the Committee on House Administration. That election will also forever be in doubt in the mind of the Democrat who ran for office.

I would say to my colleagues on this side of the aisle I will wonder if we did the right thing if this all becomes a partisan basis in the view that elections will forever be in doubt, because we do not have a procedure—and I would like to see one—for recount. But we were struck with the fact that under the laws and under our precedents there is no procedure except to call them as we see them, and that is how we did it, fairly and squarely. I do not see anybody raising that issue on the Pierce against PURSELL matter.

Mr. THOMPSON. Mr. Speaker, I yield such time as he may consume to the gentleman from Pennsylvania (Mr. AMMERMAN).

(MR. AMMERMAN asked and was given permission to revise and extend his remarks.)

[Mr. AMMERMAN addressed the House. His remarks will appear hereafter in the Extensions of Remarks.]

Mr. THOMPSON. Mr. Speaker, I move the previous question on the resolution.

The previous question was ordered.

Motion to recommit offered by Mr. Wiggins

Mr. WIGGINS. Mr. Speaker, I offer a motion to recommit.

THE SPEAKER pro tempore. Is the gentleman opposed to the resolution?

Mr. WIGGINS. I am, Mr. Speaker.

The SPEAKER pro tempore. The Clerk will report the motion to recommit.

The Clerk read as follows:

Mr. Wigigns moves to recommit the resolution H. Res. 526, to the Committee on House Administration.

The SPEAKER pro tempore. Without objection, the previous question is ordered on the motion to recommit.

There was no objection.

The SPEAKER pro tempore. The question is on the motion to recommit.

The question was taken; and the Speaker pro tempore announced that the noes appeared to have it.

Mr. WIGGINS. Mr. Speaker, I object to the vote on the ground that a question is not present and make the point of order that a quorum is not present.

The SPEAKER pro tempore. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members.

The vote was taken by electronic device, and there were—yeas 126, nays 260, answered "present" 2, not voting 44, as follows:

* * *

So the motion to recommit was rejected.

The result of the vote was announced as above recorded.

The SPEAKER pro tempore. The question is on the resolution.

The question was taken; and the SPEAKER pro tempore announced that the ayes appeared to have it.

Mr. WIGGINS. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were refused.

So the resolution was agreed to.

A motion to reconsider was laid on the table.

APPENDIX B

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
151st JUDICIAL DISTRICT

No. 1,103,064

RON PAUL, *Contestant*

vs.

ROBERT ALTON GAMMAGE, *Contestee*

Contestant's First Amended Petition

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES RON PAUL, Contestant, complaining of Robert Alton Gammage, Contestee, and for cause of action shows:

* * *

WHEREFORE, PREMISES CONSIDERED, Contestant prays that such notice as is required in such cases be given to Contestee, and that on hearing hereof a judgment be entered setting aside the certificate and result of said election and declaring Contestant to be duly elected Congressman from such District for the next term; in the alternative, and on the alternative grounds stated above, Contestant prays that an order be entered that the election held on November 2, 1976, insofar as it pertains to the office of Representative from the 22nd Congressional District should be in all things set aside and held to be invalid, and that this Court enter its order and mandatory injunction directed to the election officials within such District commanding them to give notice of and conduct a special election for such office. Contestant prays for such other and further relief as he may show himself entitled at law or in equity. Contestant further prays for an order of impoundment as above set out.

Respectfully submitted,

/s/ FITZHUGH H. PANNILL, JR.
Fitzhugh H. Pannill, Jr.
Attorney for Contestant
1938 Bank of the Southwest Building
713/652-5007
Houston, Texas 77002

Supreme Court, U. S.
FILED
MAY 20 1977
MICHAEL RODAK, JR., CLERK

No. 76-1408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

RON PAUL, *Petitioner,*

v.

ROBERT ALTON GAMMAGE, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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REPLY BRIEF FOR PETITIONER

FITZHUGH PANNILL
CARY V. SORENSEN
AUSTIN & ARNETT
1938 Bank of the Southwest Building
Houston, Texas 77002
(713) 652-5007

WILLIAM H. ALLEN
JOHN R. BOLTON
COVINGTON & BURLING
888 Sixteenth Street N.W.
Washington, D.C. 20006
(202) 452-6000

Attorneys for Petitioner Ron Paul

Of Counsel:

F. HASTINGS PANNILL
4600 Post Oak Place, Suite 207
Houston, Texas 77027

BERTRAND C. MOSER
400 Houston Bar Center Building
Houston, Texas 77002

May, 1977

TABLE OF AUTHORITIES

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REPLY BRIEF FOR PETITIONER

I.

THIS CASE IS NOT MOOT.

After Dr. Paul filed his petition for a writ of certiorari in this Court on April 12, 1977, the House of Representatives voted, on May 9, 1977, to dismiss the contest that Paul had filed in the House pursuant to the Federal Contested Elections Act, 2 U.S.C. §§ 381 *et seq.*, (1970). 123 Cong. Rec. H 4187 (daily ed. May 9, 1977).[1] Respondent now argues, incorrectly, that

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[1] The vote on the motion to dismiss the contest filed by Paul (a Republican) was by straight party line. No Republicans voted to dismiss, and only one Democrat voted against dismissing. 123 Cong. Rec. H 4187 (daily ed. May 9, 1977).

the action of the House renders this case moot. (Br. in Opp. 5-7.) [2]

Respondent relies heavily on his argument that the oath he took seating him in the House was not conditioned on the outcome of this litigation, as was the case with Senator Hartke's oath in *Roudebush* v. *Hartke,* 405 U.S. 15 (1972). This reliance is misplaced for several important reasons.

First, as matter of logic, the House can always reverse its decisions to seat Gammage unconditionally should new information come to its attention, as, for example, after a full trial of the issue in the state courts.[3] (*See* Pet. 8-9 & nn. 4-5.) The House does not lose its ability to act pursuant to Article I, Section 4, merely because it has chosen to administer an unconditional oath. It is not the captive of ritual. The words of Jefferson's Manual, explaining the oath that Members of Congress take pursuant to Article VI, Section 3, of the Constitution, state the House's options:

> "The House . . . may defer the oath [of office] when a question of qualification arises . . ., *but it may investigate qualifications after the oath is taken . . ., and after the investigation unseat the Member by majority vote.*" Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 416, 93d Cong., 2d Sess., § 204, at 78 (emphasis added).

Representative Wiggins, citing House precedent, characterized the unconditional and immediate seating of a Member as having "no effect upon the ultimate resolution by the House of the challenge to his seating." 123 Cong. Rec. H 157 (daily ed. Jan. 6, 1977).

In addition, Gammage's mootness argument rests, at bottom, on an attempt to obscure the issue on which review is sought. The issue—both before and after the House's action of May 9—is the constitutionality of Texas' contest procedure. It is not, and never has been, the ultimate authority of the House to decide which candidate to seat. The issue in this case, as in *Roudebush* v. *Hartke, supra,* is whether a state may act to ensure as far it can the integrity of its electoral processes, not whether a house of the Congress has the ultimate power. Just as this Court rejected a mootness argument in *Roudebush* because it was "based on an erroneous statement of the 'basic issue,' " 405 U.S. at 19, it should reject the similar argument made here.

If respondent's mootness argument is valid, then this Court also lacked jurisdiction to hear and decide *Powell* v. *McCormack,* 395 U.S. 486 (1969). Respondent is, by implication, asserting that, once the House decides a question within its authority, as it did when it decided not to seat Representative Powell in the 90th Congress, then judicial review is precluded merely by the fact of the House's decision. In *Powell,*

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[2] Respondent's Brief in Opposition to the Petition will be cited herein as "Br. in Opp." The Petition will be cited as "Pet."

[3] The efficacy of state court inquiries has been demonstrated in this session of Congress. The primary election victory of Representative Richard A. Tonry of Louisiana had been contested by his primary opponent both in the Louisiana courts and in the House. The Louisiana trial court ruled that but for "the irregularities and fraud," Representative Tonry's opponent would have won. Washington Post, May 5, 1977, at A1, col. 4. Representative Tonry subsequently resigned his seat in the House because of "the continuing controversy that has surrounded" his election, and because he had become "convinced" that "there were fraudulent and illegal votes cast" during the election. Letter of resignation of Representative Tonry, 123 Cong. Rec. H 3982 (daily ed. May 4, 1977).

this Court held that the issue of Representative Powell's salary was still live, and it then proceeded to decide the lawfulness of his exclusion from the 90th Congress. Here, the issue of Texas' constitutionally permitted power to establish contest procedures is still live. In neither the instant case nor in *Powell* does the action of the House serve to moot the central issue.

As this Court stated in *Powell,* "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." 395 U.S. at 496. It is still possible for this Court to render an effective order in this case regarding the constitutionality of the Texas contest procedures, and the parties retain a concrete adverseness and personal stake in the outcome of the litigation. See Note, *Mootness on Appeal in the Supreme Court,* 83 Harv. L. Rev. 1672 (1970). With the fundamental preconditions for mootness absent, the instant case is still justiciable and should be decided by this Court.

II.

THE COURT HAS JURISDICTION OF THIS CASE.

Respondent asserts that the decision below "rests upon an independent and adequate non-federal ground." (Br. in Opp. 3.) Respondent is wrong. Petitioner invoked below a state statute, Article 9.01 of the Texas Election Code, that unambiguously gives the state district courts jurisdiction "of all contests of elections" for, among others, "federal offices." The Texas Supreme Court held, in the only passage of its opinion quoted by respondent in this part of his argument (*id.* 5), that this unambiguous statute "is inapplicable to contests of elections of Members of Con-

gress, and any attempt to apply it to congressional elections would be in violation of Article I, § 5 of the Constitution of the United States." (Pet. 9a.) Elsewhere the court said that "as to members of Congress, Article 9.01 is unconstitutional and inapplicable." (Pet. 6a.) The coupling by the court of the concepts of inapplicability and unconstitutionality indicates that the court meant nothing more than to express its view that the unambiguous Article 9.01 could not constitutionally be applied to a congressional election. The court was not construing the statute, as respondent urges, but stating the result of its mistaken reading of the Constitution.

In any event, it is clear that, even if the Texas court is taken to have construed the state statute as not governing elections that on its face it unambiguously covers, that construction is dependent on the federal constitutional claim. To deprive this Court of the power to review a state decision in which a federal claim has been made, a purported state ground must be not only adequate to sustain the decision, but also independent of the federal claim. Respondent so recognizes in his statement of the rule quoted above. Compare *Poulos* v. *New Hampshire,* 345 U.S. 395, 402 (1953). Most favorably for respondent, the case is as if the Texas statute in terms covered "elections . . . for . . . federal offices (to the extent permitted by the United States Constitution) . . . ." If the Texas Supreme Court were to determine that a statute so phrased was inapplicable to congressional elections because of the restrictions of the Constitution, there would be no doubt of this Court's jurisdiction to review its decision. The construction of the statute would not be independent of but dependent on the federal question. Compare

Standard Oil Co. v. *Johnson,* 316 U.S. 481 (1942). Analytically this case is no different.

It should not be forgotten that petitioner no less then respondent rests his claim on the United States Constitution. Petitioner believes that, when the Texas legislature ordained that there should be a state procedure for resolving contests over elections for congressional offices, it was fulfilling the power that it has under Article I, Sections 2 and 4. (Pet. 12-16.) Vindication of that constitutional claim may not be thwarted by "putting forward non-federal grounds of decision that were without any fair or substantial support." *Ward* v. *Love County,* 253 U.S. 17, 22 (1920). For "if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided." *Id.* There is no tenable ground for the decision below except the mistaken constitutional ground.

III.

RESPONDENT'S OPPOSITION DEMONSTRATES THAT THE PETITION RAISES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE DECIDED BY THIS COURT.

Respondent attempts to show that the decision below is not in conflict with this Court's decision in *Roudebush* v. *Hartke, supra* (Br. in Opp. 7-10), and also that it is consistent with the rulings of other state and federal courts. (Br. in Opp. 10-12.) [4]

[4] In support of his argument that the decision of the Texas Supreme Court is consistent with the rulings of other state and federal courts, respondent cites nine decisions. (Br. in Opp. 11.) Carefully ignored is the fact that *every one of the cases cited* was decided before this Court's decision in *Roudebush*.

For all of his efforts, however, respondent succeeds only in proving the obvious—that *Roudebush* involved an Indiana recount statute, whereas the present case involves a Texas contest statute. We have previously argued that the decision below is contrary to *Roudebush*, and that if this case is not squarely controlled by *Roudebush* the decision below raises an important federal question that has not been but should be decided by this court. (Pet. 5-11.) Nothing in respondent's opposition rebuts either of these propositions.[5]

Respondent's only new contribution is the assertion that a state contest statute would "usurp" the House's power to decide the qualifications of its members. (Br. in Opp. 9-10.) Respondent's argument is based on the language of Article 9.01 *et seq.* of the Texas Election Code, which vests "exclusive" jurisdiction to decide contests in Texas state district courts, language that, in his view, would preclude action by the House. This is plainly incorrect. The jurisdictional language of Article 9.01 (which applies to specified state offices as well as congressional offices) is obviously only an allocation of judicial power among the various Texas courts. It simply precludes other Texas courts (such as county courts or municipal courts) from deciding Texas election contests.

[5] Respondent also quarrels with petitioner's analysis of the contest provisions of other states. (Br. in Opp. 13-15.) Merely as one example of his erroneous interpretation of these provisions, he asserts that the Minnesota statute, Minn. Stat. Annot. § 209.02 (1976), provides for recounts rather than contests. (Br. in Opp. 14 n. 6.) Yet the passage he quotes from the statute specifies that the Minnesota court is to determine the number of votes "legally cast at the election." It is precisely the purpose of a contest to separate the lawfully cast ballots from those unlawfully cast. That is just what the Texas contest provisions at issue here are designed to do.

Moreover, in stressing that the Texas contest procedure is judicial in nature, whereas the Indiana recount provision was non-judicial, respondent misreads the applicable portion of *Roudebush*. In *Roudebush*, this Court was called upon to determine whether the Indiana proceeding was "judicial" in order to determine whether the Federal district court injunction against the Indiana recount proceeding (later effectively vacated by this Court's reversal of the district court) violated the prohibition against injunctions of state judicial proceedings contained in 28 U.S.C. § 2283. Since the proceeding was deemed non-judicial, Section 2283 was held not to be applicable. 405 U.S. at 20-23. This Court characterized its inquiry on the injunction issue in *Roudebush* as "quite apart from the merits of the controversy," *Id.* at 20. In any event, how a state allocates the functions of government among the branches of its government is a matter of indifference under federal law. *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902); *Prentis* v. *Atlantic Coast Line R. Co.*, 211 U.S. 210 (1908).

In short, if respondent's arguments demonstrate anything, it is the importance of the question presented by the petition, an importance that should move this Court to grant the writ of certiorari.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for a writ of certiorari, this Court should grant the petition.

Respectfully submitted,

FITZHUGH PANNILL
CARY V. SORENSEN
AUSTIN & ARNETT
1938 Bank of the Southwest Building
Houston, Texas 77002
(713) 652-5007

WILLIAM H. ALLEN
JOHN R. BOLTON
COVINGTON & BURLING
888 Sixteenth Street N.W.
Washington, D.C. 20006
(202) 452-6000

Attorneys for Petitioner
Ron Paul

Of Counsel:

F. HASTINGS PANNILL
4600 Post Oak Place, Suite 207
Houston, Texas 77027

BERTRAND C. MOSER
400 Houston Bar Center Building
Houston, Texas 77002

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